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IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

STATE FARM FIRE & )  
CASUALTY CO., et al., )

Plaintiffs,)

vs. ) CASE NO. CV01435208  
          ) JUDGE MARY J. BOYLE

CENTURY 21 ARROW )  
REALTY, INC., et al., )

Defendants.)

Deposition of PATRICK A. MARTIN, a  
Witness herein, called by the Plaintiffs for  
Cross-Examination pursuant to the Ohio Rules of  
Civil Procedure, taken before me, the  
undersigned, Janine J. Howard, a Registered  
Professional Reporter and Notary Public in and  
for the State of Ohio, at the offices of Dominion  
East Ohio Gas Company, Claims Department, 1717  
East Ninth Street, Cleveland, Ohio, on Tuesday,  
the 9th of July, 2002. at 11:05 o'clock a.m.



1 APPEARANCES:

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23 ALSO PRESENT:  
24 Sharon Peterson  
25 Dominion East Ohio Gas Company

---

1 PATRICK MARTIN

2 of lawful age, a Witness herein, having been  
3 first duly sworn, as hereinafter certified,  
4 deposed and said as follows:

5 CROSS-EXAMINATION

6 BY MR. NUSSLE:

7 Q. Can you state and spell your last name?

8 A. Patrick Martin, M-a-r-t-i-n.

9 Q. Mr. Martin, have you ever been deposed  
10 before?

11 A. Yes; "A," is the initial.

12 Q. How many times?

13 A. Once.

14 Q. How long ago?

15 A. I think, five years.

16 Q. Is it related to work?

17 A. Yes.

18 Q. Okay. Well, I'm sure your attorney did an  
19 excellent job of explaining the ground rules to  
20 you. I'll just go over a few of them.

21 One of them, all responses need to be  
22 verbal in nature; "Yes," or "No." As I told  
23 Maurice, usually the young people, I have trouble  
24 with the slang.

25 A. Okay.

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1 Q. With Maurice, we had a little bit of a  
2 problem. He would try to answer my question  
3 before I got it out, and she needs to take down  
4 everything that's said. So, if you could just  
5 wait for me to finish my question before you  
6 provide an answer.

7 Also, if you don't understand a question,  
8 or don't hear it, I mumble, whatever, please ask  
9 me to repeat, or rephrase it, because if you  
10 provide a response to the question, I'm going to  
11 assume that you heard the question. Okay?

12 A. Okay.

13 Q. Where do you presently reside?

14 A. 1768 South Green Road, South Euclid, Ohio  
15 44121.

16 Q. I'm going to ask you some personal  
17 questions up front, we will get through it and  
18 move right on into the case. Okay?

19 A. Okay.

20 Q. How long have you lived there?

21 A. Since May 21, 1966.

22 Q. What's your date of birth?

23 A. 5/12/1940.

24 Q. And who lives at the South Green Road  
25 address with you right now?

1 A. My wife used to live there. She's  
 2 presently in the hospital; been there for several  
 3 months.  
 4 Q. Okay.  
 5 A. And my daughter.  
 6 Q. What's her name?  
 7 A. Kathleen, wife of 36 years; Elizabeth Ann,  
 8 who is my daughter, and Jonathan Frederick  
 9 Sansone, is my grandson.  
 10 Q. The court reporter is going to ask me  
 11 afterwards, so I might as well ask you how to  
 12 spell that?  
 13 A. S-a-n-s-o-n-e, age five.  
 14 Q. Anybody else?  
 15 A. That's all.  
 16 Q. Okay. Tell me a little bit about your  
 17 educational background. Where did you go to high  
 18 school; where did you graduate?  
 19 A. I was in grade school in Ireland.  
 20 Q. Okay.  
 21 A. High school in Euclid High School;  
 22 graduated 1960.  
 23 Q. After high school, any additional formal  
 24 education?  
 25 A. No, further education, other than a law

1 overseeing the work that we contracted out. I  
 2 also did the field notes.  
 3 Q. What are, "Field notes"?  
 4 A. Field notes, you have a copy of them  
 5 there. That's a record of the location, the  
 6 connections, the wells, or fusions on the  
 7 pipeline fusion. (Indicating.)  
 8 Q. Are you talking about this?  
 9 A. No.  
 10 Q. These?  
 11 A. No, none of that.  
 12 Q. When you say, "Field notes," what are you  
 13 talking about; you said they are in front of me?  
 14 A. No.  
 15 Q. No?  
 16 A. Field notes has got my name on it,  
 17 contractor's name on it.  
 18 Q. Okay.  
 19 A. A running record of stations.  
 20 Q. Okay. Did you say, "Of stations"?  
 21 A. Yeah. Like, they will start at zero-zero  
 22 at an intersection, or a house, or something  
 23 that's established, and you run continuous  
 24 measurements through the job, taking location of  
 25 the pipeline off the centerline, or off a curb,

1 enforcement course I took in 1977.  
 2 Q. Okay. What about military service?  
 3 A. I was in the Army, the Ohio Army National  
 4 Guard for six years.  
 5 Q. Was that from 1960 to 1966?  
 6 A. No. That would be 1962 until 1968.  
 7 Q. What did you do for the Ohio Army National  
 8 Guard?  
 9 A. I was a senior recovery mechanic; tanks.  
 10 Q. Who is your present employer?  
 11 A. I'm presently retired from Dominion East  
 12 Ohio Gas.  
 13 Q. When did you retire?  
 14 A. January 2, 2001.  
 15 Q. What was your position when you retired?  
 16 A. I was an engineering technician/pipeline  
 17 inspector.  
 18 Q. What were your job duties, responsibilities  
 19 as an engineering technician/pipeline inspector?  
 20 A. My duties included the office work,  
 21 updating the records, primarily the field notes,  
 22 and the accounting, property accounting, mainly  
 23 pipeline.  
 24 And the other part of that was the outside  
 25 work, which was working with contractors,

1 or off a property line, or whatever, so you have  
 2 --  
 3 Q. Okay.  
 4 A. -- a good record.  
 5 Q. I didn't bring everything, so maybe I have  
 6 them back at my particular office.  
 7 Would it look like a big map?  
 8 A. It would eventually become a map, yes; but,  
 9 it's in book form.  
 10 Q. Well, what did you do -- as a pipeline  
 11 inspector, what do you do?  
 12 A. As a pipeline inspector, I would go out --  
 13 be assigned a job outside. I would go out, I  
 14 would layout the pipeline where we wanted to  
 15 relay, or lay the new line. I would flag it out,  
 16 paint it out, whatever the case may be, stake it  
 17 out.  
 18 I would locate the service connections from  
 19 the house to the existing main. I would either  
 20 put a stake, or a flag at the shut-off and  
 21 somewhat open the property, kind of line it so  
 22 when the contractor dug, he would know  
 23 approximately where this service line would be.  
 24 Then, I would go to the property owners,  
 25 and I would notify them by card, or ring the

1 doorbell, and in-person, advise them as to what  
 2 was going on as far as the gas company was  
 3 concerned.  
 4 **Q. And how long were you an engineering**  
 5 **tech/pipeline inspector before you retired?**  
 6 A. Okay. I started with East Ohio Gas Company  
 7 on January 9th, I believe, of 1967. And I worked  
 8 on the streets of Barberton for two years. And  
 9 then I became an inspector in February of 1969.  
 10 And held that job through retirement.  
 11 **Q. When did you get the position of**  
 12 **engineering tech?**  
 13 A. In February of 1969.  
 14 **Q. Okay. As part of being a pipeline**  
 15 **inspector, and an engineering tech, what sort of**  
 16 **training did East Ohio give you for that job?**  
 17 A. I spent, roughly, six months between  
 18 training on the records, inside, and with the  
 19 senior technician, outside, showing you how to  
 20 take the field notes, how to deal with the  
 21 customers.  
 22 **Q. That's a total of six months?**  
 23 A. At least, six months over the years. Then,  
 24 I had additional training where we would have  
 25 class, that would be one day; two days, depending

1 on, you know, if it was -- well, it might be one  
 2 day. If it was new products, it may take two  
 3 days.  
 4 **Q. Okay. And those were put on by East Ohio**  
 5 **Gas?**  
 6 A. They were put on by the contractors, but we  
 7 had to see to it that they were properly put on.  
 8 **Q. Would they be in your personnel file; would**  
 9 **there be a listing of all of the training you**  
 10 **received over the years?**  
 11 A. Possibly, possibly. I never saw my  
 12 personnel file.  
 13 **Q. Yeah, they kind of keep those from you.**  
 14 A. Right.  
 15 **Q. Now, when you retired then, were you in**  
 16 **charge of an area, geographical area; were you in**  
 17 **charge of a department?**  
 18 A. No. I was only in charge of a job that I  
 19 was assigned to --  
 20 **Q. Okay.**  
 21 A. -- per se. If I went out on a particular  
 22 job, I would have control over the contractor.  
 23 And my primary job was to see that he followed  
 24 our safety rules and our policy, and that the  
 25 pipeline was put where we proposed.

1 **Q. Okay. And when you say, "A job," can you**  
 2 **kind of -- we are talking about a whole area of a**  
 3 **street, right?**  
 4 A. Right.  
 5 **Q. I mean, or a whole project?**  
 6 A. A whole project.  
 7 **Q. So, what was your -- were you limited at**  
 8 **all in a geographic region?**  
 9 A. No.  
 10 **Q. Anywhere East Ohio Gas wanted?**  
 11 A. Right, right.  
 12 **Q. Anywhere they had service, you could be put**  
 13 **on that project?**  
 14 A. I could work in front of my house, or I  
 15 could go to Painesville; anything in the  
 16 Cleveland division --  
 17 **Q. Okay.**  
 18 A. -- which was like Painesville, Lake County,  
 19 Geauga, Summit, Portage; those were the primary  
 20 counties.  
 21 **Q. Who was your supervisor when you retired?**  
 22 A. When I retired, my supervisor was Sam --  
 23 **Q. Mercurio?**  
 24 A. -- Mercurio, and Julie -- now, what was her  
 25 last name?

1 Kashuta was her maiden name. She got  
 2 married. I can't remember.  
 3 **Q. Can we call her Julie P.?**  
 4 A. Julie P., that would be all right.  
 5 **Q. I don't necessarily know what the -- what**  
 6 **Julie P.'s last name is either.**  
 7 **And they were your supervisors as well,**  
 8 **back when this loss happened --**  
 9 A. Yes.  
 10 **Q. - in early, 2000?**  
 11 A. Yes, sir.  
 12 **Q. Okay. Back on January 3, 2000, were you**  
 13 **issued a cell phone by East Ohio Gas?**  
 14 A. I had a cell phone for --  
 15 **Q. Is it your personal, or work?**  
 16 A. Company.  
 17 **Q. Do you remember what -- you know, cell**  
 18 **phones have been around for a while,**  
 19 **affordability, obviously; do you know when you**  
 20 **were first issued a personal phone?**  
 21 A. I had my own personal for about ten years.  
 22 **Q. How about the company?**  
 23 A. Company phone, I had personal for a year.  
 24 **Q. Before you retired?**  
 25 A. Make it two years, before I retired; make

- 1 it two years.
- 2 **Q. What sort of vehicle were you issued?**
- 3 A. I had my personal vehicle.
- 4 **Q. Did you have like, a CB in your personal**
- 5 **vehicle to communicate to the company; did you**
- 6 **have a Husky?**
- 7 A. No.
- 8 **Q. No?**
- 9 A. The only thing I had was a cell phone, or a
- 10 pay phone. That's the only two items that I
- 11 used.
- 12 **Q. Did you actually have an office you were**
- 13 **assigned to?**
- 14 A. At East 55th Street, yes, but my car was my
- 15 field office.
- 16 **Q. Is either Sam or Julie P. also located in**
- 17 **the East 55th office?**
- 18 A. They were. I don't know if they are now,
- 19 but they were at the time I retired. As far as I
- 20 know, they might still be there.
- 21 **Q. Okay. I don't know what -- how big is the**
- 22 **East 55th office?**
- 23 A. We had probably about 30 employees.
- 24 **Q. Okay. At some point in time, you were**
- 25 **assigned to a project on Turney Road, right?**

- 1 A. Right.
- 2 **Q. And do you recall when that project**
- 3 **started?**
- 4 A. That would be November of 1999.
- 5 **Q. Do you recall when it finished up?**
- 6 A. It was finished up. I left the project
- 7 December 20th of 1999, because I had vacation
- 8 that I had to take.
- 9 **Q. Okay. Did you ever get put back on the**
- 10 **project?**
- 11 A. No.
- 12 MR. LAZZARO: What was that date,
- 13 again, sir; December 20th, you left?
- 14 THE WITNESS: December 20th, I
- 15 believe is correct.
- 16 MR. LAZZARO: Thank you, very
- 17 much.
- 18 BY MR. NUSSLE:
- 19 **Q. When you left the project on December 20th,**
- 20 **what was the status of the project?**
- 21 A. The mainline was completed and tied in,
- 22 with the exception of one tie-in at that street;
- 23 I believe it was Westwood. There was one tie-in
- 24 that was out by that, that was all bypass; the
- 25 services were all transferred.

- 1 **Q. What does that mean?**
- 2 A. When we say, "Service," that is the
- 3 connection from the house to the mainline.
- 4 That's where you get your gas to your reader.
- 5 **Q. Okay.**
- 6 A. That supplies the house. And all of the
- 7 services were taken off of the old, existing line
- 8 and transferred to the new, which is in a new
- 9 location, up to -- I'm going to -- I'm trying to
- 10 give you an idea about where -- somewhere halfway
- 11 between, I want to say, Westwood Avenue, wherever
- 12 that street is. I'm not going to tell you that's
- 13 the correct name of the street. I would have to
- 14 look.
- 15 **Q. Okay.**
- 16 A. To Lec Boulevard. It was probably about 15
- 17 services all left in that area.
- 18 **Q. Who took over the project for you?**
- 19 A. The project was taken over by Charles
- 20 Sowers, S-o-w-e-r-s.
- 21 **Q. How many weeks vacation were you going on,**
- 22 **or did you go on?**
- 23 A. I was only gone to the end of the year. I
- 24 only had a few days left.
- 25 **Q. And by the end of the year, the other 15**

- 1 services were completed?
- 2 A. Completed, yes.
- 3 **Q. Now, when you said the mainline was**
- 4 **completed, and they were tied in, "Tied in" to**
- 5 **what?**
- 6 A. The existing service. The existing house
- 7 line comes from the meter to the mainline.
- 8 Now, when we connect, or re-connect, we
- 9 sever the existing line from the old line. We
- 10 make a whole new connection at the new mainline,
- 11 including the curb stop and the necessary
- 12 fittings to tie it together, to put it back where
- 13 it is.
- 14 We put sulfuric acid in, and at that time,
- 15 we cap, or plug the existing main, because it
- 16 would still have gas in it.
- 17 **Q. I got a little confused there, but we will**
- 18 **go back.**
- 19 A. Okay.
- 20 **Q. Let's start with, why was the main gas line**
- 21 **on Turney Road being relocated, or changed?**
- 22 A. The Cuyahoga County Engineer's office had a
- 23 project to reconstruct Turney Road from Dunham
- 24 Road to Lee Boulevard. And in reconstructing the
- 25 road, they were going to widen it, I believe, to

1 two-plus feet on each side, plus put a new sewer  
 2 down on the south side, which is where our  
 3 existing gas line was located, in other words, we  
 4 had a conflict --  
 5 **Q. Okay.**  
 6 **A. -- with their project.**  
 7 **Q. So, the sewer was going to run into the gas**  
 8 **line?**  
 9 **A. The sewer would go where the gas line was**  
 10 **presently sitting.**  
 11 **Q. Okay. So, you have to move your gas line?**  
 12 **A. So, we had to move our gas line back into a**  
 13 **one-foot right-of-way, and one-foot off the**  
 14 **property line, or say, 39 feet off the centerline**  
 15 **of the road, the established centerline of the**  
 16 **road.**  
 17 **Q. I'm going to learn a lot here today.**  
 18 **The "One-foot right-of-way," what's that?**  
 19 **A. That's the back of the walk, which is**  
 20 **generally the right-of-way line. That's where**  
 21 **the city property stops and the private property**  
 22 **begins. We put our gas line, roughly, one-foot**  
 23 **on the city side of that to keep it off of**  
 24 **private property. And it's a foot to 2 feet, I**  
 25 **mean, you know, it can fluctuate.**

1 **old gas line removed?**  
 2 **A. No.**  
 3 **Q. Okay. So, you have an old gas line, and**  
 4 **you have a new gas line, right?**  
 5 **A. Right.**  
 6 **Q. Then, you have the service line from the**  
 7 **house to the street?**  
 8 **A. Right, that's correct.**  
 9 **Q. And at some point in time, the service line**  
 10 **is connected up to the old pipe, right?**  
 11 **A. Right.**  
 12 **Q. And the new pipe is sitting there?**  
 13 **A. Right.**  
 14 **Q. And you have to turn the pipe off to the**  
 15 **gas line?**  
 16 **A. Correct.**  
 17 **Q. And therefore, there is no gas to the**  
 18 **house?**  
 19 **A. Correct, right.**  
 20 **Q. Then, what; you cut the service line? \***  
 21 **A. You cut the service line. All of that gas**  
 22 **in the old line, until we get all of the services**  
 23 **transferred, we do not take the gas. We have gas**  
 24 **in the new line. We have gas in the old line.**  
 25 **We do this by putting up a bypass, which takes**

1 **Q. That would involve tearing up the sidewalks**  
 2 **and the addresses?**  
 3 **A. Yes, sir, absolutely.**  
 4 **Q. The apron?**  
 5 **A. Absolutely.**  
 6 **Q. Did you re-pour the sidewalks?**  
 7 **A. No. The city requested that we put in,**  
 8 **like, an asphalt-type of mix, called Coal Mack.**  
 9 **Q. Okay.**  
 10 **A. And that was set up where people could**  
 11 **walk.**  
 12 **Q. Okay. Eventually, though, was that torn**  
 13 **up?**  
 14 **A. Eventually, by the county, that was all**  
 15 **taken out.**  
 16 **Q. So, they redid the sidewalks?**  
 17 **A. They redid the sidewalks, right.**  
 18 **Q. Who redid the aprons; do you know what I**  
 19 **mean by, "Apron"?**  
 20 **A. The aprons were done by the county.**  
 21 **Q. Okay.**  
 22 **A. We just put in a temporary repair.**  
 23 **Q. Okay. Let's back up a little bit.**  
 24 **You have your old gas line -- let me ask**  
 25 **you this: When a gas line is relocated, is the**

1 **gas and feeds both systems. We would have two**  
 2 **systems in operation, the existing system and the**  
 3 **new system.**  
 4 **Q. Okay.**  
 5 **A. While we transfer the service from the old**  
 6 **system, the old main, which is, in this case, it**  
 7 **was steel, to the new main, which was plastic.**  
 8 **We have to turn off the curb stop, and then we**  
 9 **would make it a totally new connection of**  
 10 **plastic, which the new main was plastic.**  
 11 **We would set a whole new plastic**  
 12 **connection, and then off of that connection, we**  
 13 **would put the necessary components, the curb**  
 14 **stop, and the necessary fittings that tie the --**  
 15 **if it would be plastic. It was like a stake**  
 16 **coupling. If it was steel, we would have to use**  
 17 **another type of fitting.**  
 18 **Q. So, you weren't replacing the service**  
 19 **lines?**  
 20 **A. No.**  
 21 **Q. The service lines were still steel?**  
 22 **A. The service lines would stay, unless they**  
 23 **failed a test. We had to put a test on them.**  
 24 **You were not allowed, by law, to tie-in a service**  
 25 **without it being tested.**

1 Q. What was that test called?  
 2 A. Well --  
 3 Q. Do you remember?  
 4 A. Well, the test would be like 10 pounds for  
 5 10 minutes on an old steel line. It would be 90  
 6 pounds for 10 minutes on what we call an  
 7 insertion, or a plastic line; or a new steel line  
 8 would be 90 pounds for 10 minutes.  
 9 Q. Okay. At some point in time, you provide  
 10 notices to the people on Turney Road around the  
 11 addresses of 15302, with the fact that there is a  
 12 main relocation with the gas company that's going  
 13 to occur, right?  
 14 A. Yes, sir.  
 15 Q. Do you remember when you did that?  
 16 A. I broke that job into sections. So, what I  
 17 did is, I went from the beginning, which would be  
 18 that house in question, that we are talking about  
 19 153 --  
 20 Q. 15302?  
 21 A. -- 02 to -- I'm going to call the street,  
 22 Westwood, okay. I would do all of the work in  
 23 conjunction with that area first. Locate the  
 24 service, stake out the new line. A lot of times  
 25 stake out the existing lines, so that nothing I

1 document. Can you take a look at that?  
 2 A. Yes, I can.  
 3 (Witness complied.)  
 4 Q. Does that look familiar to you?  
 5 A. Yes, sir.  
 6 Q. What is Exhibit A?  
 7 A. Exhibit A is the envelope that I would  
 8 insert two cards in to.  
 9 Q. One is a yellow one, and one is a green  
 10 one?  
 11 A. Yes. And I would put, on this particular  
 12 card, like you see here, the phone number.  
 13 Q. Whose phone number is that?  
 14 A. That would be our office phone number,  
 15 where we had the lady to answer the phone and  
 16 kind of took the complaints. And I would tell  
 17 her, prior to starting a job, that I was on this  
 18 particular job, any complaints, or any calls come  
 19 in, direct these calls to me, to my pager, and I  
 20 would get back.  
 21 This is the envelope I would also put my  
 22 name, "P.A. Martin, Inspector, or Engineering  
 23 Tech. Relocate gas main. (Indicating.)"  
 24 Q. Okay. Wait a second. I see the, "Main  
 25 relocation," but I don't see the, "P. Martin"?

1 get. Then, I would do a sidewalk diagram,  
 2 because when you did that, that got people out  
 3 asking questions.  
 4 Q. What's a, "Sidewalk diagram"?  
 5 A. That's a sketch of paper with blocks that  
 6 would represent the sidewalk. You would have,  
 7 like, three blocks, small blocks. And it would  
 8 have a vacant spot here that would represent the  
 9 tree lawn. And on that, you would note the  
 10 sidewalks, the condition of the sidewalks,  
 11 whether it be cracked, whether it be stone,  
 12 whether it be concrete, whatever; brick,  
 13 whatever, you would note that on there.  
 14 And in the course of doing that, you know,  
 15 you do like one house. I would go to the door,  
 16 and I would put a card on the door.  
 17 (Indicating.)  
 18 MR. NUSSLE: Can you mark this  
 19 as Exhibit A?  
 20 (Thereupon, Plaintiff's Exhibit A  
 21 to the deposition was marked for  
 22 purposes of identification.)  
 23 BY MR. NUSSLE:  
 24 Q. Mr. Martin, I'm handing you what has been  
 25 marked as Plaintiff's Exhibit A. It's a two-page

1 A. I don't think I wrote -- looks like my  
 2 writing. (Indicating.)  
 3 Q. Mr. Martin, before we go any further, this  
 4 has all been verbal. We have to be clear.  
 5 A. Okay.  
 6 Q. When you say, "This," isn't your writing,  
 7 what you are looking at are the words, "Main  
 8 relocation"?  
 9 A. "Main Relocation."  
 10 Q. You are saying that's not your writing?  
 11 A. That is my writing.  
 12 Q. That is your writing?  
 13 A. That is my writing.  
 14 Q. And the phone number written here?  
 15 A. That is my writing.  
 16 Q. How about the writing, which is in the  
 17 upper corner, "Monday, 11/22"?  
 18 A. No, that is not mine.  
 19 Q. You wrote, "Main relocation"?  
 20 A. Uh-huh.  
 21 Q. But, you didn't write your name?  
 22 A. No, not on this, no.  
 23 Q. Okay. So, continue on.  
 24 I'm sorry, you were saying something about  
 25 writing, "P. Martin, Main relocation"?

- 1 A. Yeah. Generally, I would write, "P.A.  
2 Martin, Engineering Tech, or Inspector, East Ohio  
3 Gas Company."  
4 Q. So, there were two cards in there, one  
5 green and one yellow?  
6 A. And one yellow. Right now, on the  
7 yellow --  
8 Q. Okay. Let's not get there first.  
9 A. Okay. When you are ready.  
10 Q. Page 2 of this exhibit appears to be the  
11 back of the gray envelope?  
12 A. That's correct.  
13 Q. There is some writing on that as well.  
14 It's dated 11/30/1999, "Left message for Julie  
15 P.," that's not your writing, correct?  
16 A. No, no, sir. The phone number and, "Main  
17 relocation," is my writing. (Indicating.)  
18 Q. Okay. But, Exhibit A does not indicate  
19 that the gas would be turned off at any point,  
20 does it?  
21 A. No.  
22 Q. And it does not indicate a date that the  
23 gas may be turned off?  
24 A. No, no.  
25 MR. NUSSLE: Well, let's go with

- 1 A. Yes, sir.  
2 Q. What handwriting is on there?  
3 A. That is my handwriting. The type of work  
4 was a code that we used, which would mean, like,  
5 a mainline replacement.  
6 Q. So, that's what the "Code 3" means?  
7 A. Yes, sir.  
8 Q. Okay. What's the, "061," your number?  
9 A. 061, the contractor's warehouse number. It  
10 identifies the contractor.  
11 Q. Who is the contractor -- was there --  
12 A. This would come back. If it went back to  
13 the computer, it would come back down to Mercurio  
14 Construction. (Indicating.)  
15 Q. Were they the only contractor on this job?  
16 A. Yes, sir.  
17 Q. And then, your initials?  
18 A. That's my initials. (Indicating.)  
19 Q. Okay. Then, you indicated there should  
20 have been a green card in this envelope?  
21 A. Yes, sir.  
22 Q. What do you recall the green card would  
23 indicate?  
24 A. The green card would state the reason that  
25 we have to occasionally dig to maintain our

- 1 Exhibit B.  
2 (Thereupon, Plaintiff's Exhibit B  
3 to the deposition was marked for  
4 purposes of identification.)  
5 BY MR. NUSSLE:  
6 Q. Okay. Mr. Martin, I've handed you what has  
7 been marked as Plaintiff's Exhibit B, can you  
8 tell me what that is?  
9 A. That is the market research card that we  
10 have used for several years. This card here is  
11 for complaints that somebody was unhappy with  
12 what we did, or how we did the job, or how they  
13 were notified, or what have you. They would make  
14 this out and return it, return to us, and we  
15 would have to respond to this. (Indicating.)  
16 Q. Okay. And that is a two-page document?  
17 A. Yes, sir.  
18 Q. And the second page is -- well, the first  
19 page is the outside of the envelope?  
20 A. That's correct.  
21 Q. And the second page is the inside of the  
22 envelope?  
23 A. That's correct.  
24 Q. Okay. And it has some handwriting on the  
25 second page, right?

- 1 facilities. And it would also, like, have a  
2 promise to restore the premises to as good, or  
3 better than it was prior to us digging there.  
4 Q. Okay. Exhibit B, then, that does not  
5 indicate a date that the gas would be turned off?  
6 A. No, sir.  
7 Q. Okay.  
8 A. I'm on a different card.  
9 Q. The green card that would have been  
10 enclosed with that, that we don't have today,  
11 does that indicate that the gas is going to be  
12 shut off?  
13 A. No.  
14 Q. Okay.  
15 A. No. It might indicate that the gas might  
16 have to be shut off to do the work. But, to my  
17 knowledge, it doesn't indicate that it would be  
18 shut off.  
19 Q. Before we get to marking, I'm going to hand  
20 you a piece of paper, okay?  
21 A. Yes, sir.  
22 Q. And it's a lined piece of paper with some  
23 handwriting on it?  
24 A. Yes, sir.  
25 Q. Is any of your handwriting on there?



1 A. Yes, sir, all of it. (Indicating.)  
 2 MR. NUSSLE: Then, let's mark  
 3 it.  
 4 (Thereupon, Plaintiff's Exhibit C  
 5 to the deposition was marked for  
 6 purposes of identification.)  
 7 MR. NUSSLE: You know what this  
 8 is, right, Steve?  
 9 MR. PRUNESKI: Yes.  
 10 BY MR. NUSSLE:  
 11 Q. Mr. Martin, I'm handing what has been  
 12 marked as Plaintiff's Exhibit C, that's a  
 13 one-page document, right?  
 14 A. That's correct.  
 15 Q. What is Exhibit C?  
 16 A. Exhibit C is what I would call a log.  
 17 There is a phase sheet to this, that would say,  
 18 like, "East Ohio Gas Company Construction  
 19 Report," or something. It's got like a heading  
 20 on it. This would be like the second page.  
 21 (Indicating.)  
 22 Q. Okay.  
 23 A. The first page would be -- it would start  
 24 down here somewhere. (Indicating.)  
 25 Q. And you are indicating about one-third of

1 the way down?  
 2 A. Yeah, yeah.  
 3 Q. Okay.  
 4 A. That's correct.  
 5 Q. Let's take a look at that. There is a date  
 6 on the left-hand side. What's the first date?  
 7 A. Up at the top is 12/15/199.  
 8 Q. And why did you write that date down; did  
 9 you do something on that date?  
 10 A. "7:00 a.m., on job. Tie-in at Lee Road and  
 11 tie-in east of Dunham Road. Remove 6-inch  
 12 plastic main at the southwest corner of Lee and  
 13 Turney Roads. Tom Myers," who is the supervisor,  
 14 and the Randall shop, "is on the job."  
 15 Q. Tom Myers, supervisor for who?  
 16 A. He's the supervisor, Construction and  
 17 Maintenance.  
 18 Q. For East Ohio?  
 19 A. Dominion East Ohio. And he was at the  
 20 Eastern Division at the Randall Shop, what we  
 21 call Randall Shop.  
 22 Q. Now, when you are on this project then, are  
 23 you out there eight hours a day?  
 24 A. Yes, sir.  
 25 Q. You are just watching the contractors work,

1 and making sure they are doing things right?  
 2 A. Yes, sir.  
 3 Q. Now, under that date then, it says, "City  
 4 and Inspection," or what?  
 5 A. "City inspector." On each job, we are  
 6 required to have an inspector who works for,  
 7 like, in this case, it was a quality control  
 8 inspection, QCI. They watch, like, the  
 9 backfilling. They watched for, like, the  
 10 property owners.  
 11 Q. Now, when you say, "City inspector" --  
 12 A. Yeah.  
 13 Q. -- "QCI," that's the City of Maple Heights?  
 14 A. City of Maple Heights hires a private  
 15 company, QCI, and they furnish the inspectors for  
 16 their projects.  
 17 Q. Okay.  
 18 A. Sewer, gas, water, whatever the project may  
 19 be.  
 20 Q. Okay. Do you keep -- now, I see below  
 21 there is kind of two columns on this --  
 22 A. Yeah.  
 23 Q. -- Exhibit C, under, "City inspect," it  
 24 says, "8 hours," right?  
 25 A. That's correct.

1 Q. There is another date, right, December --  
 2 go ahead.  
 3 A. "12/16/1999." I showed it was snow. "City  
 4 inspector, QCI, eight hours," and again, it says,  
 5 "7:00 a.m., on job. Start at 15302. Transfer M  
 6 to C"; that's the main to curb. That's the  
 7 connection we are talking about.  
 8 And we ended that day at house 15502. We  
 9 had to skip a house because the service came out  
 10 where there was a large tree, and Mr. Myers,  
 11 who --  
 12 Q. Wait. After the 15, you skip house 15418?  
 13 A. Yes, sir.  
 14 Q. This says, "A/C"?  
 15 A. That's correct.  
 16 Q. What does that stand for?  
 17 A. On account of tree.  
 18 Q. Okay.  
 19 A. The service -- over the years, somebody  
 20 planted a tree over the service. And a large  
 21 tree grew, and we did not want to be digging  
 22 around the tree. So, this is where Mr. Myers had  
 23 a crew out there to deal with issues like that.  
 24 Q. So, Tom Myers was in charge of the C&M  
 25 office?

- 1 A. That's his area. He's in charge of that  
2 area. Each supervisor has X-number of cities.  
3 And each city has a truck assigned --  
4 Q. Okay.  
5 A. -- for emergencies, or whatever else comes  
6 up.  
7 Q. Do you keep -- obviously, there are three  
8 dates on this Exhibit C, which is one page;  
9 December 15th, 16th, and 17th?  
10 A. Yes.  
11 Q. Do you keep a log for every single day?  
12 A. Yes, sir, I did.  
13 Q. So, there is actually a log at some point  
14 for what you did on the job between November 20th  
15 and December 15th?  
16 A. Yes.  
17 Q. Okay. Well, let's keep going there.  
18 December 16, 1999 -- well, let me ask you a  
19 question.  
20 Was there any particular reason you put the  
21 word, "Snow," there?  
22 A. Well, I try to put in what the day was  
23 doing, if it was snowing, raining, cold, you  
24 know.  
25 Q. That's just something you do, or something

- 1 that's required?  
2 A. That's not required. Something I did,  
3 something I do.  
4 Q. Why is there to the left of that date,  
5 "12/16," there is like a star, or a circle  
6 around it?  
7 A. That was when I pulled that out to write  
8 the letter explaining what happened.  
9 Q. Okay.  
10 A. I probably put that star there, I'm going  
11 to say, probably because -- I'm not sure.  
12 Q. So, you put, "Skip house 15418 on account  
13 of tree. C&M will insert 12/17/99"?  
14 A. Right. They made arrangements to insert  
15 the new plastic inside the existing steel.  
16 Q. Okay. Now, does that mean, Tom Myers was  
17 on the job that day?  
18 A. No. Tom Myers had a crew. He had a  
19 two-man crew with a truck on the job that day.  
20 Q. Just that job day, or every day?  
21 A. Every day, every day.  
22 Q. Then, what's the line beneath that say?  
23 A. The line beneath that, on the next date,  
24 you are talking about?  
25 Q. No. "12/16," still; this is the important

- 1 part of this case.  
2 A. "House 15302 vacant. Called realty company  
3 to advise to contact East Ohio Gas." And at  
4 4:30, I left the job.  
5 Q. Okay. Now, how did you know house 15302  
6 was vacant?  
7 A. Because when I first arrived on the job, I  
8 saw that there was a sign close to the driveway,  
9 close to the sidewalk, like a brown sign with a  
10 realtor's name on it, and a phone number.  
11 Q. Well, that doesn't mean the house is  
12 vacant, necessarily, does it?  
13 A. No.  
14 Q. Okay.  
15 A. I called the number. The young lady  
16 answered the phone.  
17 Q. Now, this is back on November 20th?  
18 A. This is back in the beginning of --  
19 November 18th, 19th, the beginning of the job.  
20 The first two days on the job was the 18th and  
21 the 19th, I was out there by myself.  
22 Q. Okay.  
23 A. And one of those two days, I went to the  
24 phone, I called the number that I had there,  
25 talked to a young lady on the phone. And I

- 1 explained to her that we were going to be  
2 starting a project for the Cuyahoga County  
3 project, that the tree lawn, the driveway, all  
4 around the house would be affected.  
5 There would be a large excavation in front  
6 of the house. The service would be affected at a  
7 later date, but we would do the mainline part of  
8 the project first. We would not interrupt the  
9 service at that time.  
10 Q. Okay.  
11 A. But, at a later date, we would have to  
12 interrupt the service, which means disconnect it,  
13 and re-tie it to the new main.  
14 Q. And what did she say?  
15 A. I said -- I asked if the house is vacant,  
16 and if they have a listing of the realtor for the  
17 house. And she said, "Yes, the house is vacant.  
18 Yes, we have a listing; and, yes, you do go ahead  
19 with whatever your job is. I will give you a  
20 number for Mr. Amato" --  
21 Q. Okay.  
22 A. -- "and you leave your message on his  
23 telephone answering machine."  
24 Q. So, she patched you through to an answering  
25 machine?

- 1 A. Yes, sir.  
 2 Q. Okay. This lady, do you recall her name?  
 3 A. No, sir, I didn't get her name.  
 4 Q. Even though, she told you her name?  
 5 A. Didn't get it. I don't remember now if she  
 6 did; I didn't get it.  
 7 Q. I know this is just over the phone, but did  
 8 she appear to be young, old?  
 9 A. Younger voice, sounded younger.  
 10 Q. That's all you had to go by?  
 11 A. Yes, sir.  
 12 Q. Did she say, like, what capacity she was in  
 13 at the office, being receptionist, or agent?  
 14 A. A receptionist, I would say.  
 15 Q. My question is: Did she tell you what she  
 16 does?  
 17 A. She said she takes the calls for the  
 18 realtors, the salesmen, personnel.  
 19 Q. Okay.  
 20 A. And she checks the listing as to who has  
 21 them.  
 22 Q. But, she's the one that answered the phone  
 23 when you called the number?  
 24 A. Yes, sir.  
 25 Q. And she put you through to this Chuck

- 1 Amato's voice mail, and did you leave a message  
 2 there?  
 3 A. Yes, sir.  
 4 Q. Tell me what Chuck Amato's message said; do  
 5 you recall that?  
 6 A. Chuck Amato's message said, "Accept a  
 7 challenge," I don't have the whole detail of what  
 8 it is. It stated, "You have to leave the message  
 9 at the tone," or whatever it is.  
 10 I left my name, my pager, my business, what  
 11 was going to be going on there. And I may have  
 12 included, like, the length of time it would take  
 13 to do this job. And that this would be a large  
 14 excavation at this house.  
 15 Q. Now, when you contacted this lady, and  
 16 eventually, with Chuck Amato, did you do that  
 17 from the field, or was that back in your office?  
 18 A. Field.  
 19 Q. Okay. Did you use your cell phone?  
 20 A. No.  
 21 Q. You used a pay phone?  
 22 A. Used a pay phone.  
 23 Q. But, you had a cell phone to use?  
 24 A. I had a cell phone, but they were on us  
 25 about not using the cell phones. They were

- 1 trying to control the costs. So, they told us  
 2 when there was a pay phone available, to use a  
 3 pay phone.  
 4 MR. NUSSLE: Okay. Let's take a  
 5 break.  
 6 (Thereupon, a recess was taken.)  
 7 BY MR. NUSSLE:  
 8 Q. Back on the record.  
 9 Do you agree with me that it was Century  
 10 21's office that you called?  
 11 A. Yes, sir.  
 12 Q. And you called that office because it was a  
 13 for-sale sign in front of 15302 Turney?  
 14 A. Yes, sir.  
 15 Q. Is that standard practice, any house that  
 16 has a for-sale sign, to call it?  
 17 A. Yes.  
 18 Q. You called the realtor -- when I say, "Call  
 19 it," you called the realtor?  
 20 A. Yes, yes.  
 21 Q. Okay. Now, is that the case even when it  
 22 appears that someone is living there?  
 23 A. If someone is living there, I would be  
 24 knocking on the door.  
 25 Q. Okay. You said you made this first call on

- 1 November 18th, or 19th?  
 2 A. Yes.  
 3 Q. And that's also the same time when you  
 4 dropped off Exhibits A and B?  
 5 A. That's correct.  
 6 Q. Well, at that point in time, for houses  
 7 unless you physically saw someone at the house,  
 8 you wouldn't know whether the house was vacant,  
 9 or not, correct?  
 10 A. No.  
 11 Q. And that's a bad question and that is an  
 12 attorney question.  
 13 I want to make sure that the response is  
 14 clear, and you understood my question.  
 15 Now, on November 18th, or November 19th,  
 16 when you first dropped off Exhibits A and B, and  
 17 saw the for-sale sign in front of 15302 Turney,  
 18 did you know the house was vacant at that point  
 19 in time, before you called Century 21?  
 20 A. No.  
 21 Q. So, you called Century 21, then, out of  
 22 your standard practice of calling houses with  
 23 real estate signs --  
 24 A. Yes, sir.  
 25 Q. -- in front of them?

1 A. Yes, sir.  
 2 Q. Now, do you do that because that's what you  
 3 do, or because you are required to by East Ohio  
 4 Gas?  
 5 A. That's what I do, because of my interest in  
 6 the customers.  
 7 Q. Well, being service, customers what; just  
 8 because of your interest in customers?  
 9 A. Well, keeping the customers happy, keeping  
 10 them informed of what's going on, you know.  
 11 Q. Okay.  
 12 A. It was like P.R., we relied a lot on public  
 13 relations --  
 14 Q. Okay. This exhibit --  
 15 A. -- that type of job.  
 16 Q. This Exhibit C that we have in front of us,  
 17 is it created on a day-to-day basis?  
 18 A. This one? (Indicating.)  
 19 Q. Yes.  
 20 A. I can only speak for myself. For my  
 21 myself, all of the years I was there, I always  
 22 kept the daily log of everything I did.  
 23 Q. Okay. But, you kept it on a daily basis?  
 24 A. On a daily basis, yes, sir.  
 25 Q. Now, as of December 16, 1999, besides

1 would put a time down.  
 2 Q. Okay. When was the gas shut off at 15302  
 3 Turney on this project?  
 4 A. I would have to rely on the notes to tell  
 5 you.  
 6 Q. The notes in Exhibit C?  
 7 A. Yeah. That would be 12/16 of '99.  
 8 Q. And you know that because it says,  
 9 "Transfer M"?  
 10 A. Yeah, transfer service.  
 11 Q. Okay. So, I just want to make sure we are  
 12 clear.  
 13 On November 18th, or 19th, I'm not really  
 14 going to hold you to that close of a date --  
 15 A. Okay.  
 16 Q. -- you sent -- you left, at 15302, what is  
 17 Exhibit A and B, and a green card?  
 18 A. Correct, correct.  
 19 Q. And you also testified that on whatever  
 20 date that is, you also called Century 21 and  
 21 spoke with a lady, and gave her information about  
 22 the project?  
 23 A. Correct.  
 24 Q. And left a message with Chuck Amato?  
 25 A. Correct.

1 Exhibits B and C, and a green card that we don't  
 2 have with us, did you place any other notice at  
 3 15302 Turney?  
 4 A. Yes.  
 5 Q. Okay. What notice, and when?  
 6 A. When we were going to turn the gas off, and  
 7 transfer the service, which would be in December,  
 8 I'll say, I placed a blue card, which lists the  
 9 addresses.  
 10 Q. What addresses, the houses?  
 11 A. The houses involved, addresses. On the day  
 12 of your intent to do this work, we usually try to  
 13 do this, like, one day prior to the work. We  
 14 like to try to give them a day's notice.  
 15 And again, that would have my name on it.  
 16 It would have a number different than I showed  
 17 you there. It would have 361-2345; that's the  
 18 all purpose number on there. (Indicating.)  
 19 Q. Okay. So, any other written notices would  
 20 have been left at the house?  
 21 A. Well, on that particular card, we would  
 22 note that on, say, the following day, our intent  
 23 was to shut the gas off --  
 24 Q. Okay.  
 25 A. -- at -- you know, if we knew what time, we

1 Q. And then, the next contact -- well, the  
 2 next information that you provided to 15302  
 3 Turney that the gas would possibly be shut off,  
 4 was December 15th?  
 5 A. Correct.  
 6 Q. And that is the day before the gas was --  
 7 A. Or it could be two days, I mean.  
 8 Q. Okay. When that blue card was left, did  
 9 you also call Century 21?  
 10 A. Yes, sir.  
 11 Q. Okay. Now, if you would have done that,  
 12 would you have noted that on your notes?  
 13 A. Not necessarily, because what I would do  
 14 is, when we turn the gas off, okay, I had a  
 15 crew -- I had a C&M crew, which is the big truck  
 16 with two men, in case you had a leak, okay, they  
 17 were there to run a new service, okay.  
 18 On that crew, I had a technician who was  
 19 qualified to lite-up services. I also had a  
 20 customer service representative, who would go in  
 21 the house, you know, test -- testing the service  
 22 after we made the tie-in, gave it the ten-minute  
 23 test for 10 minutes, or the 90-pound test for 10  
 24 minutes, before we could legally light the  
 25 service up.

1 I had those two fellows with me -- three  
 2 fellows with me the whole time. One was  
 3 primarily to --  
 4 **Q. The whole project?**  
 5 A. Yeah.  
 6 **Q. Okay.**  
 7 A. Yeah.  
 8 **Q. I'm sorry, keep going.**  
 9 A. The whole idea was, if there was a bad  
 10 service at that particular time of the year, they  
 11 wanted to get it done that day, so that the  
 12 customer would have heat that night.  
 13 **Q. Okay. Now, when you called Century 21 on**  
 14 **the date that you left this blue card, who did**  
 15 **you then speak with?**  
 16 A. I then talked with the same lady. I  
 17 explained to her, even before we even shut the  
 18 gas off, that on this particular date, we would  
 19 shut the gas off. It would require having  
 20 somebody from her company coming out to see me on  
 21 the job, so I could get the customer serviceman,  
 22 or the technician on the C&M truck to relight  
 23 the -- test the service, and relight the  
 24 appliances.  
 25 **Q. Okay. And what did she say?**

1 A. She said, "Okay." Again, she says, "I'm  
 2 going to put you in to Mr. Amato, because  
 3 Mr. Amato has the listing and he also has the key  
 4 to the house."  
 5 **Q. Now, at this point in time, you know, you**  
 6 **are aware that you hadn't received a return call**  
 7 **from the first message that you left with Chuck**  
 8 **Amato?**  
 9 A. Ycs.  
 10 **Q. Did you discuss that with her at all, this**  
 11 **lady?**  
 12 A. I did. She said he was aware of what's  
 13 going on.  
 14 **Q. Did she tell you that -- did she tell you**  
 15 **that he told her he was aware or --**  
 16 A. She said that, "He has gotten the messages  
 17 and he is aware of what's taking place."  
 18 **Q. And you are sure it was the same lady?**  
 19 A. Yes, sir.  
 20 **Q. At that point in time, did you ask her if**  
 21 **Chuck Amato had a pager, or cell phone you could**  
 22 **try to contact him with?**  
 23 A. No.  
 24 **Q. And with the second call to Century 21, did**  
 25 **you use a pay phone, or a cell phone?**

1 A. I used a pay phone.  
 2 **Q. Now, are you familiar with these Huskey's,**  
 3 **that the field service reps carry?**  
 4 A. What's a, "Husky"?  
 5 **Q. Like machines?**  
 6 A. No.  
 7 **Q. No?**  
 8 A. (Witness shaking head from side to side.)  
 9 **Q. When you arrived on December the 16th, at**  
 10 **15302 Turney, did you see the blue card there?**  
 11 A. No.  
 12 **Q. Where did you stick the blue card the day,**  
 13 **or two before the 16th?**  
 14 A. I'm going to say, the doorway off the  
 15 driveway, on the -- I would say on the route to  
 16 the garage.  
 17 **Q. Inside the door?**  
 18 A. No. What I usually did was, I would take  
 19 the card like so --  
 20 **Q. Wait a second. That's an exhibit. Don't**  
 21 **do that.**  
 22 A. Okay. Give me --  
 23 **Q. Now, this, what I am going to hand you is**  
 24 **the grey envelope, that's actually Exhibit A,**  
 25 **that has a door handle thing on it?**

1 A. Yes.  
 2 MR. PRUNESKI: Do you want a  
 3 card?  
 4 MR. NUSSLE: Sure.  
 5 MR. PRUNESKI: We will go off the  
 6 record.  
 7 THE WITNESS: I would do --  
 8 (Indicating.)  
 9 MR. PRUNESKI: Stop. Let's get a  
 10 real one. Off the record.  
 11 (Thereupon, a discussion was  
 12 held off the record.)  
 13 (Thereupon, Plaintiff's Exhibits D  
 14 and E to the deposition were marked  
 15 for purposes of identification.)  
 16 BY MR. NUSSLE:  
 17 **Q. We are going to go back on the record.**  
 18 **This is going to be kind of folded, go back**  
 19 **and fill it in. I'm handing you something marked**  
 20 **as Plaintiff's Exhibit D, which is a green card,**  
 21 **correct?**  
 22 A. Correct.  
 23 **Q. Again, tell us what that is.**  
 24 A. That's the card that tells the customers  
 25 that we are working on the pipelines on your

1 street. It's required because of the maintenance  
 2 we have to do. It tells you about the property,  
 3 when it will be restored. Tells you that you  
 4 have the authority from the governing  
 5 authorities.  
 6 Q. Just so we are clear --  
 7 A. Yeah.  
 8 Q. -- Exhibit D, I have referred to a green  
 9 card earlier in the deposition that we talked  
 10 about, and that would go along with Exhibits A  
 11 and B?  
 12 A. Yes, sir, absolutely.  
 13 Q. Okay.  
 14 A. Those would go together.  
 15 Q. Let's move ahead here.  
 16 Then, you talked about a blue card. We  
 17 went off the record for a little bit, couldn't  
 18 find a blue card, but we now have.  
 19 What's Plaintiff's Exhibit E?  
 20 A. Okay.  
 21 Q. What is Plaintiff's Exhibit E?  
 22 A. This would be the card that would be your  
 23 intent to shut the gas off, which he would have  
 24 gotten the day before, or two days before, or the  
 25 day of.

1 MR. NUSSLE: Okay. Do you have  
 2 one of the -- off the record.  
 3 (Thereupon, a discussion was  
 4 held off the record.)  
 5 BY MR. NUSSLE:  
 6 Q. Back on the record.  
 7 Okay. Mr. Martin, I just want to get  
 8 everyone on the same page here. We have here a  
 9 calendar from 1999, and it appears that December  
 10 13th was a Monday, correct?  
 11 A. 13th, I imagine, yes.  
 12 Q. Well, that's what this calendar says,  
 13 "13th, Monday"?  
 14 A. Yeah, okay.  
 15 Q. So, December 15th, which is the first date  
 16 we had on Exhibit C, which is a Wednesday?  
 17 A. Yes.  
 18 Q. So, the first date of the shut-off at  
 19 15302, would be Thursday, December 16, 1999,  
 20 right?  
 21 A. Yes.  
 22 Q. Okay. So, you are saying some time of the  
 23 week of December the 13th, you left this, a blue  
 24 card --  
 25 A. Yes.

1 Q. -- which is reflected in Plaintiff's  
 2 Exhibit E?  
 3 A. Yes.  
 4 Q. At 15302 Turney?  
 5 A. Yes.  
 6 Q. And also, on the same day, you called  
 7 Century 21, again?  
 8 A. Correct.  
 9 Q. Mr. Amato's voice message the second  
 10 time you called, a day or two before  
 11 December 16, 1999, was it any different than when  
 12 you had called in November 1999?  
 13 A. The same.  
 14 Q. On that voice message, did it provide a  
 15 pager number for Mr. Amato?  
 16 A. No, not to my knowledge.  
 17 Q. Okay. Did you ask this lady at Century 21  
 18 if Mr. Amato was in the office at the time?  
 19 A. She said he was.  
 20 Q. She said he was in the office at the time?  
 21 A. Ycs; not in the office. He was working at  
 22 the time.  
 23 Q. Okay. Did she say who he was working for  
 24 at the time?  
 25 A. No.

1 Q. And you are calling between 8:00 a.m., and  
 2 4:00 p.m.?  
 3 A. Yes, sir.  
 4 Q. Okay. Let's move on to December 17, 1999.  
 5 Could you just go ahead and read the  
 6 verbiage you put down?  
 7 A. "December 17, 1999, 7:00 a.m., on job.  
 8 Start on house 15418. C&M insert house 15610.  
 9 C&M insert. End at house 15614."  
 10 C&M inserted 15418, and apparently, they  
 11 must have done two houses, 15610, because of  
 12 leaks, and we ended at 15614.  
 13 Q. Keep going, please.  
 14 A. "Layout pass cards."  
 15 Q. What's, "Pass cards"?  
 16 A. That's this card right here. (Indicating.)  
 17 Q. Exhibit E?  
 18 A. Yeah, for houses that we would be shutting  
 19 down the following day.  
 20 Q. Okay.  
 21 A. Because these people were home and knew  
 22 what we were doing, and I gave them this,  
 23 anyway. (Indicating.)  
 24 You want me to continue reading?  
 25 Q. Continue reading, please.

1 A. "Layout" --  
 2 Q. I think you are at the next line, where it  
 3 says, "Sowers."  
 4 A. Yeah. "Sowers taking over project. City  
 5 inspector, Bob Ill on job. Relieved by Rich  
 6 Roda." That was an inspector for QCI, that  
 7 represents Maple Heights.  
 8 "And informed by city, walks have to be  
 9 installed and tree lawns graded; no ruts on this  
 10 project. This project will not start until June  
 11 of 2000, or later. Tom Myers on job. C&M crew  
 12 on job. Customer serviceman on job. So far,  
 13 crew has done great job on this project; 4:30  
 14 p.m., off job."  
 15 Q. Now, that's December 17, 1999?  
 16 A. Yeah.  
 17 Q. Which is a Friday?  
 18 A. Yes, sir.  
 19 Q. That's your last day on this project?  
 20 A. Yes.  
 21 Q. I see no reference on December 17th to  
 22 15302 Turney?  
 23 A. No, because 15302 was done, transferred on  
 24 the previous day.  
 25 Q. Well, it was transferred, but the house was

1 turned on, because without heat, there could be a  
 2 freeze-up."  
 3 Q. And this is the same lady?  
 4 A. Same lady.  
 5 Q. What did she say?  
 6 A. She said she would inform Mr. Amato. She  
 7 did not put me in to his machine at that time.  
 8 Q. What part of the day, if you recall, would  
 9 you have made this call on December 17th to  
 10 Century 21?  
 11 A. That would be 1:00, roughly, maybe in the  
 12 afternoon.  
 13 Q. Well, at that particular time -- well, once  
 14 again, did you make that call from a cell phone,  
 15 or pay phone?  
 16 A. Pay phone.  
 17 Q. Did you -- was there a gas station, or  
 18 what?  
 19 A. There was a McDonald's in the area that I  
 20 ate lunch and used the facilities at, on Dunham  
 21 Road.  
 22 Q. On Dunham?  
 23 A. Yeah.  
 24 Q. Did you ask her if Mr. Amato had a pager,  
 25 that you could try his pager number?

1 vacant, and you had called Century 21 Realty, and  
 2 left a message, someone should be out there?  
 3 A. Yes, I did. I said, "It was imperative  
 4 that they contact the gas company."  
 5 Q. On December 21st?  
 6 A. Yes, I did.  
 7 Q. On December 17, 1999 --  
 8 A. Go ahead.  
 9 Q. You don't know how I am going to finish my  
 10 question. Let me break it down.  
 11 Did you visit 15302 Turney Road to see that  
 12 the gas had been turned back on?  
 13 A. Yes, sir.  
 14 Q. What did you find?  
 15 A. The gas was off.  
 16 Q. The gas was on?  
 17 A. Off.  
 18 Q. That tells you that no one contacted East  
 19 Ohio Gas after you left the job on December 16th?  
 20 A. Correct.  
 21 Q. What did you do on December 17th, to get  
 22 the gas turned back on at 15302 Turney?  
 23 A. I called Century 21, told the lady that,  
 24 "It was imperative that they call the East Ohio  
 25 Gas Company, at (216) 361-2345, and have the gas

1 A. No.  
 2 Q. So, you left the job at 4:30, on  
 3 December 17, 1999?  
 4 A. Correct.  
 5 Q. And at that point in time, no one from  
 6 Century 21 showed up at 15302 Turney, correct?  
 7 A. No, sir.  
 8 Q. Did you inform Mr. Sowers of this fact?  
 9 A. Yes, sir.  
 10 Q. Verbally?  
 11 A. Verbally.  
 12 Q. Okay. Now, when it says, "He's taking over  
 13 the project," he doesn't have to be on the  
 14 project on December the 20th, right?  
 15 A. No.  
 16 Q. He was out at the project that day?  
 17 A. He was on the project that day.  
 18 Q. Because he was taking it over?  
 19 A. Yeah.  
 20 Q. He had to get up to speed?  
 21 A. Taking over in my place, but he did not  
 22 stay on the project. Somebody else took over the  
 23 project because he, too, went on vacation.  
 24 Q. On the 20th, or later?  
 25 A. After, later, later.

1 Q. Okay.  
 2 A. When, I don't know.  
 3 Q. So, at some point in time, on December 17,  
 4 1999, you are telling us that Mr. Sowers came out  
 5 to the project, and you brought him up to speed  
 6 with everything that was going on?  
 7 A. Correct.  
 8 Q. I want to make sure that we are clear.  
 9 From Exhibit C then, you were fully aware  
 10 on December 16, 1999, that 15302 was vacant,  
 11 right?  
 12 A. Correct.  
 13 Q. Did you contact customer service for a  
 14 phone number to contact the actual customer?  
 15 A. Didn't have the actual customer's phone  
 16 number.  
 17 Q. I know. But, customer service would have  
 18 had that prior to --  
 19 A. No.  
 20 Q. Okay. Someone had -- East Ohio Gas would  
 21 have the number?  
 22 A. I can't answer that.  
 23 Q. Okay. Did you ever try to -- okay.  
 24 So, at no time at all, did you ever make an  
 25 attempt to find out who the owner of that

1 what happened?  
 2 A. Yes, he did.  
 3 Q. And you did that?  
 4 A. Yes, sir.  
 5 (Thereupon, Plaintiff's Exhibit F  
 6 to the deposition was marked for  
 7 purposes of identification.)  
 8 BY MR. NUSSLE:  
 9 Q. Okay. I'm handing you what has been marked  
 10 as Plaintiff's Exhibit F, if you could take a  
 11 look at that?  
 12 A. Yes, sir.  
 13 Q. Do you recognize that document?  
 14 A. Yes, sir.  
 15 Q. It's two pages, right?  
 16 A. Yes.  
 17 Q. What is Exhibit F?  
 18 A. That's the letter that I wrote to Mr. Novak  
 19 explaining what transpired on the job, up to my  
 20 last day on the job.  
 21 Q. Which was December the 17th?  
 22 A. Yes, correct.  
 23 Q. Now, in this particular letter, if you go a  
 24 little bit more than halfway down, it indicates  
 25 that the date that you left this blue card, which

1 property was at 15302 --  
 2 A. No, sir.  
 3 Q. -- Turney?  
 4 A. No, sir.  
 5 Q. And at no time did you attempt to directly  
 6 contact, via telephone, the owner at 15302  
 7 Turney?  
 8 A. No, sir.  
 9 Q. All right. Then, you were on vacation for  
 10 what, two weeks?  
 11 A. Until January 3rd; I believe, January 3rd.  
 12 Q. And then, at some point in time you were  
 13 informed that there were busted water pipes at  
 14 15302 Turney, right?  
 15 A. Yes, sir. January 6th, I was on a project  
 16 in Solon, and I was called by my supervisor.  
 17 Q. Steve Novak?  
 18 A. Right, correct.  
 19 Q. He wasn't normally your supervisor?  
 20 A. No, sir.  
 21 Q. What did Mr. Novak inform you of?  
 22 A. He wanted to know what happened, and how  
 23 this occurred. And I explained to him what had  
 24 transpired.  
 25 Q. And then, did he request that you write out

1 we have a standard one as Plaintiff's Exhibit E,  
 2 you left it at 15302 to 15418 Turney, on December  
 3 15th?  
 4 A. Correct.  
 5 Q. Okay. If you go to the next page --  
 6 A. (Witness complied.)  
 7 Q. -- start at the fifth line down, where it  
 8 says, "On Thursday," do you see that?  
 9 A. Right. It starts right there.  
 10 Q. Can you just start reading that for me?  
 11 A. "On Thursday, 12/16, re-tie service.  
 12 Called in to Central Dispatch as 18, Number 18."  
 13 Q. What does that mean?  
 14 A. That means that it's a code that the  
 15 service is off at the curb, at the meter, and it  
 16 has to be tested at 90 pounds for 10 minutes.  
 17 And if there is nobody home, or nobody  
 18 around, we would say, "Hold for call." That  
 19 would mean that the customer would call in when  
 20 they got home, or at their convenience, or  
 21 whenever they would be available for customer  
 22 service to respond.  
 23 Q. Okay. Keep going. So, that, "90-10," the  
 24 90 pounds, 10 minutes?  
 25 A. Yes, that's correct, because that was a



1 plastic service --  
 2 Q. Okay.  
 3 A. -- and required it.  
 4 Q. Okay. Then it says, two more lines down,  
 5 "Left card on door"?  
 6 A. You lost me.  
 7 "Hold for call, off at curb, on at meter,  
 8 and house vacant".  
 9 Q. "House vacant"?  
 10 A. "House vacant, and phone number. Left card  
 11 on door."  
 12 Q. Now, that's your business card?  
 13 A. That's my -- (Indicating.)  
 14 Q. Another Exhibit E?  
 15 A. Yeah.  
 16 Q. So, that's the second, "Blue card" that you  
 17 left?  
 18 A. Right, right, right.  
 19 Q. Okay.  
 20 A. With my name on this card, it would be  
 21 somewhere where it says, "Representative," with a  
 22 number, (216) 361-2345, that would be the  
 23 Cleveland Division, that would be circled, to  
 24 make an appointment and meet the customer service  
 25 representative. (Indicating.)

1 continue on there, again, "Left message to call,  
 2 (216) 361-2345, for lite-up. All cards put on  
 3 door of house were picked up"?  
 4 A. Correct.  
 5 Q. And so, then, I want to make certain, you  
 6 had left a card on the 15th, and the 16th?  
 7 A. Yes, sir.  
 8 Q. As well as Exhibits A, B, and D?  
 9 A. That's correct.  
 10 Q. And you left all of those at the side door?  
 11 A. Yes, sir.  
 12 Q. Okay. I think we were getting to a point  
 13 of Plaintiff's Exhibit E. I don't know if you  
 14 could do it with Exhibit E. You were talking  
 15 about folding it up?  
 16 A. I could do it better with the envelope,  
 17 because this card here would be by itself.  
 18 (Indicating.)  
 19 Q. Okay.  
 20 A. We could put it in an envelope, but I  
 21 couldn't tell if we did or not. I would say, we  
 22 put it in an envelope.  
 23 Q. So, on the 15th and 16th, where were you  
 24 leaving this, on the door?  
 25 A. On the door, on the driveway side.

1 I called again on Friday, the 17th, again,  
 2 left message to call that same number for  
 3 lite-up. (Indicating.)  
 4 Q. Okay. Right there, it says, you state, "I  
 5 called again on Friday, 12/17/1999"?  
 6 A. Uh-huh.  
 7 Q. Who did you call again?  
 8 A. Century 21, Mr. Amato's office, same lady  
 9 answered.  
 10 Q. Now, at that point in time, did you leave a  
 11 message for Mr. Amato?  
 12 A. I left a message with the lady, for  
 13 Mr. Amato, that it was imperative that they  
 14 called the gas company, and get someone to come  
 15 out there, or make an appointment to meet him on  
 16 the job.  
 17 Q. And that is the same message that you left  
 18 with that lady on the 16th?  
 19 A. Same message.  
 20 Q. Did you ask for Mr. Amato's pager?  
 21 A. No, sir.  
 22 Q. Did you ask if he could be paged?  
 23 A. No, sir. She said he was aware of  
 24 everything.  
 25 Q. So, then on the 17th -- then, if you

1 Q. Are you sticking it between the screen  
 2 door?  
 3 A. I put it between the door opener, they have  
 4 a brown thing.  
 5 Q. Yes.  
 6 A. If I could get into the regular knob on the  
 7 door, I would put that on that, because it has  
 8 that big hole on it for the doorknob.  
 9 (Indicating.)  
 10 Q. Okay. So, we can see on Exhibit E, it  
 11 looks like there is a circular white spot there,  
 12 towards the top?  
 13 A. Yeah.  
 14 Q. You are saying, if it was the real card,  
 15 the card would be -- the hole would be put over  
 16 the doorknob?  
 17 A. This probably would have a small hole where  
 18 you could put it on a doorknob, yes.  
 19 (Indicating.)  
 20 (Thereupon, a discussion was  
 21 held off the record.)  
 22 BY MR. NUSSLE:  
 23 Q. Besides Plaintiff's Exhibit F, which is a  
 24 two-page document in front of you --  
 25 A. Yes, sir.

- 1 Q. — have you ever written out what  
2 transpired, otherwise?  
3 A. No, sir.  
4 Q. What did you do with Exhibit F after you  
5 wrote it out?  
6 A. I faxed this to the — a copy of the  
7 original to Mr. Novak. (Indicating.)  
8 Q. Okay.  
9 A. The same day that I wrote it.  
10 Q. Okay. Now, if we look on page 2 of Exhibit  
11 F, that's your signature down there toward the  
12 bottom, right?  
13 A. Yes, sir.  
14 Q. Now, do you see some other writing below  
15 your signature?  
16 A. Yes, sir.  
17 Q. It says, "Pat called realtor three times;  
18 he never showed up," right?  
19 A. That's not my writing.  
20 Q. That's not your writing, but that's what it  
21 says?  
22 A. Yes, sir.  
23 Q. Do you know whose writing it is?  
24 A. No, sir.  
25 Q. When Steve Novak called you on January the

- 1 A. No, sir.  
2 Q. Were there blinds on the property?  
3 A. I cannot say.  
4 Q. Okay. Now, when you come to a property,  
5 it's for-sale, you think this may be vacant,  
6 obviously, you ring the doorbell, and you knock,  
7 right?  
8 A. Yeah, that's correct.  
9 Q. I mean, this is not what I would term a  
10 large house; do you kind of peak inside a window,  
11 or the front windows?  
12 A. No, I try not to.  
13 Q. East Ohio Gas doesn't want you to do that?  
14 A. No.  
15 Q. Might get a few calls?  
16 A. No. They don't like you peaking in  
17 windows.  
18 Q. Okay. Now, in your experience then, have  
19 you ever had occasion where you are on a project  
20 in the wintertime, like it was when this project  
21 was occurring, and the person had gone "South,"  
22 or "Snowbird," and left for the winter?  
23 A. Yes, sir.  
24 Q. Okay. Even in a case like that, how do you  
25 contact a person?

- 1 6th, then he told you there was water damage at  
2 the property?  
3 A. Yeah. The house had frozen-up and that  
4 there was severe water damage.  
5 Q. Did he tell you when it was discovered that  
6 the house was frozen-up?  
7 A. No, sir.  
8 Q. What else did he tell you, that you recall?  
9 A. Not much; that's about it. He just asked  
10 me to write a letter.  
11 Q. At that point, did he ask you to tell him  
12 what happened, and then, you told him, and then  
13 he told you to write it down?  
14 A. Yes, "Write it down. Write it down."  
15 Q. At any point in time — now, this is  
16 related to 15302 Turney, okay?  
17 A. Correct.  
18 Q. Did you ever see any cars in that driveway?  
19 A. Cars, no.  
20 Q. Did you ever see any lights on in the  
21 house?  
22 A. No, sir.  
23 Q. Was the mail piling up in the mailbox?  
24 A. I couldn't tell you.  
25 Q. Did you ever see anyone at that property?

- 1 A. Well, what we used to do in a case like  
2 that, was, we would notify the city police  
3 department, that they would send a police officer  
4 out, and we would get a locksmith.  
5 We would get a supervisor from customer  
6 service, and a serviceman, and they would get in  
7 the house. The police officer would go through  
8 the house with them, make sure the house was  
9 locked up, and secure, and a report made by both  
10 the gas company, and the police officer as to  
11 what they did.  
12 Q. Okay. Did you ever think of doing that in  
13 this case?  
14 A. No. We only did that when we had no phone  
15 number, or no way of locating, because a lot of  
16 times what happened, the wintertime when we  
17 worked in these streets, you would have water,  
18 and a lot of times water would get into the main,  
19 and it would shut the gas off to the residence.  
20 And this was something we never liked to  
21 do, is, go into somebody's house, unknown to  
22 them, or in some cases, a neighbor would have a  
23 key and have access to the house, they would call  
24 there and get permission from them to let our  
25 people in.

- 1 Q. Who would call them?  
 2 A. Usually, the neighbor would call and get  
 3 permission, and escort our people into the house.  
 4 Q. The neighbor would be receiving the notice  
 5 that their gas was off?  
 6 A. The neighbor that was away, they would pick  
 7 up their mail, or they would pick up anything, or  
 8 they would stop and see you, and say, "If you  
 9 have anything with this house, you have to see  
 10 me," and leave their phone number, or addresses  
 11 where they lived, or what have you.  
 12 Q. Okay. And you indicated, in order to get  
 13 the police involved with this and a locksmith,  
 14 there was no way to contact the person at the  
 15 residence, right?  
 16 A. Right. There was absolutely no way of  
 17 contacting.  
 18 Q. Okay. Well, there has to be a bill going  
 19 to the residence, correct?  
 20 A. Yes.  
 21 Q. Did you ever check where that bill is  
 22 going?  
 23 A. No.  
 24 Q. Someone at East Ohio Gas may do that, but  
 25 not you?

- 1 A. Not us. We never tamper with mailboxes.  
 2 We never went into mailboxes.  
 3 Q. If someone went south for the winter, they  
 4 may have their bill forwarded to the address in  
 5 Florida?  
 6 A. Yeah, I agree with you, yeah.  
 7 Q. Did you ever have a situation -- I mean,  
 8 does that occur?  
 9 A. No, not in my time.  
 10 Q. Let's see. We know that C&M -- that the  
 11 C&M Department had knowledge of this project, and  
 12 we know -- what department were you in?  
 13 A. I was in the Engineering -- Cleveland  
 14 Engineering Department.  
 15 Q. And the Engineering Department had  
 16 knowledge of this project?  
 17 A. Yes.  
 18 Q. We know that some outside service had  
 19 knowledge of this Turney Road project, right?  
 20 A. Yes.  
 21 Q. What other department would have knowledge  
 22 of this Turney Road project?  
 23 A. All departments.  
 24 Q. All departments?  
 25 A. All departments dealing with it would have

- 1 knowledge.  
 2 Q. Okay. On this -- I want to limit this. I  
 3 don't want it to be the whole Turney Road  
 4 project, but I guess, I will.  
 5 On this Turney Road project, were there any  
 6 other vacant houses?  
 7 A. There was one vacant house where the  
 8 gentleman was in the process of going to the  
 9 nursing home.  
 10 Q. But, that one got re-tied okay?  
 11 A. That one got re-tied, because a neighbor  
 12 called a son and said that we were going to be  
 13 shutting the gas off. And he also said that this  
 14 was an older gentleman in the house that was  
 15 very, very ill.  
 16 And the son came down there immediately and  
 17 found out when we were going to do this. We gave  
 18 him the time, almost to the minute. We had a  
 19 standby crew there, in case something wasn't  
 20 right. He had an ambulance set up to transport.  
 21 Q. Any other houses vacant?  
 22 A. One other house was not vacant. It had a  
 23 very sick lady, and through the home care  
 24 service, we were able to get her transferred.  
 25 Q. So, you arranged to tie-in through the home

- 1 care ambulance?  
 2 A. Well, the family and the home care. The  
 3 home care service was there. And what we did in  
 4 that case, we cranked the heat up as high as we  
 5 could, got the house warm, shut it off, and got  
 6 everything done, got everything tied in.  
 7 Q. How long does a re-tie take?  
 8 A. Probably, about a half-hour. Usually,  
 9 those things are about a half-hour, if you don't  
 10 have any problems. When you have a plastic  
 11 service, then the test is your biggest item,  
 12 longest item.  
 13 Q. Okay. Any other house on this Turney Road  
 14 project for sale?  
 15 A. For sale, I don't recall.  
 16 Q. You don't know what happened to any of  
 17 these notifications at the Dennewitz house?  
 18 A. No, sir.  
 19 Q. Did you ever talk to Julie P. about this  
 20 loss?  
 21 A. No.  
 22 Q. How about Sam?  
 23 A. Sam was advised that the house was off.  
 24 Q. Before you went on vacation?  
 25 A. Yes.

- 1 Q. Okay. So, in addition to Mr. Sowers, you  
2 told Sam Mercurio --  
3 A. Mercurio.  
4 Q. -- that the gas was off?  
5 A. The gas was off at that particular house.  
6 Q. Anyone else with East Ohio that you are  
7 aware of, that had knowledge that this gas was  
8 off when you left for vacation on December 17th?  
9 A. Sowers knew, and his replacement was Victor  
10 Magazine. So, he was out there toward the end of  
11 the job. But, I think all of the services and  
12 everything were transferred when he came out. He  
13 was out for, like, the clean up.  
14 Q. So, did Victor get out on the job after the  
15 water damage?  
16 A. He came out before the damage and after  
17 Sowers went on vacation. I went on vacation  
18 first, then Sowers was gone. And Victor would be  
19 the last one on the job.  
20 Q. When you are on a project like this Turney  
21 Road project, would you go to the office every  
22 day?  
23 A. No.  
24 Q. Just arrive at the job at 7:00 and leave at  
25 4:30?

- 1 would have to call it in after four.  
2 Q. It indicates in his statement, too, that,  
3 "Dispatch was notified of the Number 18 orders"?  
4 A. Correct.  
5 Q. Okay. And the, "Number 18 orders," meaning  
6 that the gas was off?  
7 A. "Gas off, require to test."  
8 Q. Okay. Who is, "Dispatch"?  
9 A. Central dispatch is our radio system that  
10 dispatches customer service as their own  
11 dispatchers, since C&M, Construction and  
12 Maintenance, has their own dispatch. And G.O.D.,  
13 which is Gas Operation, who regulates the  
14 pressures, have their own dispatchers.  
15 Q. Okay. In your office -- in the office at  
16 East 55th Street, is there anyone inside customer  
17 service there?  
18 A. Inside customer service, no.  
19 Q. Okay.  
20 A. There is no customer service at all at East  
21 55th Street.  
22 Q. Was there anyone that -- be it your  
23 supervisor, Julie, or -- who is your other  
24 supervisor, Sam?  
25 A. Sam.

- 1 A. That's right, that's correct. My vehicle  
2 was my office.  
3 Q. I understand. Just a second, please.  
4 Did you ever go inside 15302 Turney Road?  
5 A. No, sir.  
6 Q. Now, on December 16th, then Russ Mazzola  
7 was the current service rep on this Turney Road  
8 project?  
9 A. Yes, he was.  
10 Q. And he wrote out a statement; have you read  
11 that statement?  
12 A. Yes, sir.  
13 Q. Okay. Now, it indicates in his statement  
14 that you informed him that someone from the real  
15 estate company may be out about 3:30 p.m.; do you  
16 recall that?  
17 A. Yes, yes.  
18 Q. Where did you come up with 3:30?  
19 A. From the lady in the office, that I talked  
20 to.  
21 Q. Okay. What did she tell you, that who  
22 would show up?  
23 A. She thought that Mr. Amato would come with  
24 a key at about 3:30 to get -- I said, "There is  
25 nobody there on the job after four," that they

- 1 Q. Let me ask you this: Did you have access  
2 to the customer's records?  
3 A. No.  
4 Q. Do you know if Julie, or Sam had access to  
5 computer records?  
6 A. I couldn't tell you, I don't know.  
7 Q. By, "Customer records," I mean, like their  
8 addresses, phone number?  
9 A. No, I don't know.  
10 Q. Okay. At any point in time, did you try to  
11 find out the phone number for the property owner  
12 at 15302 Turney?  
13 A. No, sir.  
14 Q. I have got some documents in response to a  
15 request for Production of Documents, 2-A, General  
16 Condition and Specifications for Construction of  
17 Natural Gas Pipelines, 55 pages long.  
18 Do you recognize that?  
19 A. Yeah. This is the S.O.P., Standard  
20 Operating Procedure.  
21 Q. Okay. And I looked through here, and  
22 obviously, there is a lot of general, customer  
23 service-type statements in here, but as far as --  
24 do any of the guidelines -- does any of the  
25 information in here provide you with guidelines

1 on what to do in contacting the customer to  
2 inform them that the gas would be turned off?

3 A. Not that I know of, not that I really know  
4 of.

5 Q. Okay.

6 A. No, sir.

7 Q. Okay. And then, S.O.P., 3-A, Customer  
8 Service Operating Procedure, that's a 49-page  
9 document.

10 Do you recognize that?

11 A. No, because we do not have this in our  
12 S.O.P., that I use. We don't have this section  
13 here. (Indicating.)

14 Q. Okay.

15 A. This is probably for the servicemen.

16 Q. Okay. Obviously, you left some notices,  
17 and made some phone calls to try to tell somebody  
18 about the Turney Road project for 15302 Turney  
19 Road.

20 What tells you -- what document at East  
21 Ohio tells you what to do, or you just know how  
22 to do this through experience?

23 A. Just through experience. Pretty much  
24 everything we do is pretty much through  
25 experience. There is no written document, that I

1 was?

2 A. I cannot recall it at the time.

3 Q. Is it the same cell number for the two  
4 years that you had it?

5 A. Yeah, yes.

6 MR. NUSSLE: I don't have any  
7 other questions.

8 CROSS-EXAMINATION

9 BY MR. LAZZARO:

10 Q. Mr. Martin, hi.

11 A. Yes, sir.

12 Q. My name is Skip Lazzaro. I represent  
13 Century 21 Arrow Realty, and also Mr. Amato. I  
14 have a couple questions, and I apologize up  
15 front, that some may be repetitious to get to  
16 that question.

17 Your name is Patrick Martin?

18 A. That's correct.

19 Q. The year 1999, the year 2000, your position  
20 at East Ohio Gas Company was engineering  
21 technician or pipeline inspector?

22 A. Correct.

23 Q. And one of your jobs was to notify property  
24 owners by card, or otherwise, regarding what was  
25 going on with the gas line, correct?

1 know of, that says, do this, this, and this.

2 Q. And you called the real estate company  
3 based upon your own experience?

4 A. Yes, sir.

5 Q. During the time you were with the East Ohio  
6 Gas then, did you ever have a problem contacting  
7 a customer for a re-tie, via these cards, and so,  
8 you left a message on their home phone?

9 A. Not -- I'm going to say, no.

10 Q. Did you ever contact somebody in customer  
11 service to request that they contact -- well, let  
12 me strike that.

13 Did you ever contact anyone with East Ohio  
14 Gas, indicating that you couldn't get ahold of  
15 the people who are either residing at this  
16 property, or own this property, that their gas is  
17 going to be turned off, "Can you give them a  
18 phone call"?

19 A. No, because that has not arisen.

20 Q. Okay. And I just want to make sure that  
21 none of the phone calls, which you made to  
22 Century 21, were through the use of your cell  
23 phone?

24 A. No, sir.

25 Q. Do you remember what your cell phone number

1 A. Correct.

2 Q. In your testimony taken previously, you  
3 stated that you made a number of calls to Century  
4 21 Arrow Realty, correct?

5 A. Yes, I did.

6 Q. Again, I apologize for being repetitious.  
7 Sometimes you have to ask one question for it to  
8 lead to another, and I apologize.

9 But, can you tell me how many calls?

10 A. I can say about five or six,.

11 Q. Five or six calls?

12 A. Five or six, yeah.

13 Q. What were the dates of those calls?

14 A. I can't give you all of the dates.

15 Q. You don't remember the dates?

16 A. Other than what I have written down, that's  
17 all I remember.

18 Q. You don't remember the dates?

19 A. No.

20 Q. Could you remember the times?

21 A. Times could be from 10:00 in the morning  
22 until say, 1:00 in the afternoon.

23 Q. Until 1:00, but you don't remember any  
24 specific times?

25 A. No, sir, not at all.

- 1 Q. Well, where were all of these calls made  
2 from?  
3 A. From McDonald's on Turney Road.  
4 Q. The same McDonald's?  
5 A. Yeah. I use McDonald's for lunch there. I  
6 made calls from there and I used the facility  
7 there.  
8 Q. All of the calls were made from 10:00 to  
9 1:00?  
10 A. Right, yes, sir.  
11 Q. Were you in McDonald's all of this time?  
12 A. I had cancer surgery, that's one of the  
13 problems I have. I have to use the facility a  
14 lot.  
15 Q. When you called these five or six times,  
16 did you always talk to the same individual?  
17 A. Yes, sir.  
18 Q. Same person?  
19 A. Yes, sir.  
20 Q. Do you have her name?  
21 A. No, sir.  
22 Q. At that time, you had a cell phone,  
23 correct?  
24 A. Yes, sir.  
25 Q. What was the purpose of the cell phone, if

- 1 job a lot.  
2 Q. Could you look, please, at Exhibit C?  
3 A. (Witness complied.)  
4 Q. Exhibit F?  
5 A. (Witness complied.)  
6 Q. Both of these exhibits are in your writing,  
7 correct, sir?  
8 A. Yes, sir.  
9 Q. And one of them would be, basically, your  
10 day in and day out card that you used?  
11 A. Yes.  
12 Q. Daily log?  
13 A. Call it daily log.  
14 Q. Exhibit F is a document that you wrote, or  
15 had written on January 6, 2000, correct?  
16 A. Correct.  
17 Q. Let's start with Exhibit C. Why isn't  
18 there -- excuse me, you had previously testified  
19 that you had allegedly made a call on 12/17 to  
20 the real estate company. Why didn't you mark  
21 that on the card?  
22 A. I can't answer that, because I probably  
23 didn't put everything, every call that I made,  
24 everything that I did. I mean, it was just --  
25 this is like a general. This is like a general

- 1 you weren't going to make these type of calls  
2 from your cell phone?  
3 A. Because the company says if there is a pay  
4 phone in the area, they would prefer that we use  
5 pay phones, whatever, because some of the  
6 conversation were lengthy, or could be lengthy.  
7 Q. So, every one of these phone calls were  
8 from McDonald's, correct?  
9 A. Right.  
10 Q. Not one was from your cell phone?  
11 A. Not to my knowledge.  
12 Q. How many calls did you make from your cell  
13 phone on the average, during this time period  
14 and -- I mean, December of 1999?  
15 A. Very few.  
16 Q. Very few?  
17 A. Very few.  
18 Q. Who would you call?  
19 A. Well, if I got a page from the office, they  
20 wanted me right-of-way, I would call. If I got  
21 an emergency from home, I would call. Pretty  
22 much that was about it.  
23 Q. That's it, emergency from home and page  
24 from the office?  
25 A. Yeah, because I walked a lot. I walked the

- 1 description of what I did each day. Everything  
2 that I did every day didn't go on here.  
3 (Indicating.)  
4 Q. Would it be fair to say that, though, the  
5 fact that someone's gas was turned off, and  
6 nobody was responding to any of your cards, or  
7 whatnot, would be important?  
8 A. It would be important, but this wouldn't  
9 necessarily mean that I would put it on this.  
10 (Indicating.)  
11 Q. Now, if you look at Exhibit F.  
12 A. Which one is F?  
13 Q. It is the letter.  
14 A. Uh-huh.  
15 Q. You only mention on here -- this is your  
16 blow-by-blow analysis after the fact; would it be  
17 fair to say that you only made one phone call to  
18 Mr. Amato -- excuse me, Century 21?  
19 A. No.  
20 Q. Okay. How many phone calls do you note on  
21 here to Century 21?  
22 A. You are talking about 12/15/99, that I left  
23 a card at 15302; that would probably only  
24 indicate one.  
25 Q. One card?

1 MR. PRUNESKI: Read the whole  
2 thing. Let him read the whole thing, because you  
3 have read it, and you know it says, "Two."

4 MR. LAZZARO: I'm just asking.

5 MR. PRUNESKI: You read it. It  
6 says, "Two"; why would you answer for him?

7 MR. NUSSLE: Let's not answer  
8 for him.

9 MR. LAZZARO: We are going to get  
10 into that.

11 THE WITNESS: "Finished mainline  
12 replacement on 12/15/99. On 12/15/99, I left a  
13 card advising from house 15302 to 15418, that gas  
14 would be off on 12/16/1999, to re-tie the  
15 services, with phone number (216) 361-2345, for  
16 lite-up. I called the realtor, Century 21, at  
17 (216) 883-2100, the phone listed on the for-sale  
18 sign. Talked to the lady in office answering the  
19 phone."

20 MR. LAZZARO: You don't have to  
21 read it out loud.

22 MR. PRUNESKI: You didn't read the  
23 whole thing. Read the whole thing before you  
24 answer the question, is what I am asking you to  
25 do.

1 Exhibit F, states that you called twice?

2 A. Yeah, I know I called more than that.

3 Q. Now, when you called, did you -- were you  
4 able to leave a message on a voice mail; excuse  
5 me, were you?

6 A. Yes, sir.

7 Q. How many times did you leave a message on  
8 the voice mail?

9 A. Every time that I called, that the lady put  
10 me through to his extension, or his number.

11 Q. How many times is that?

12 A. I couldn't begin to tell you.

13 Q. So, you don't remember how many voice mails  
14 you left?

15 A. No.

16 Q. When you left a voice mail, what would you  
17 say?

18 A. I would say, "This is Patrick Martin  
19 calling from the East Ohio Gas Company. I'm  
20 working on Turney Road. Your gas is going to be  
21 turned off." I will leave my pager number, "To  
22 call me on the pager and I would call you right  
23 back."

24 I would advise them as to what was going  
25 on, when the gas was off -- going to be turned

1 THE WITNESS: (Witness complied.)

2 According to this, there would be two.  
3 (Indicating.)

4 BY MR. LAZZARO:

5 Q. Okay. Now, I am reading your second page,  
6 where you refer to your second call. And it  
7 states here, "Hold for call," that you had talked  
8 to -- "Called in to Central Dispatch," and then  
9 later on, you called again on Friday, 12/17/99.

10 Is there any reference in this note that  
11 when you said you called again, and that referred  
12 to the realtor?

13 A. Well, when I called again, that would be  
14 the realtor.

15 Q. It wasn't Central Dispatch that you had --

16 A. No.

17 Q. -- that you had referred to on 12/16?

18 A. No, no.

19 Q. Your testimony is, you called five to six  
20 times, your notes reflect?

21 A. Yeah.

22 Q. On this card that you called, which is  
23 Exhibit C, you called once?

24 A. Yeah.

25 Q. And your analysis made on what is marked as

1 off, was turned off, and that it's imperative  
2 that somebody get out here with a key to let our  
3 man in the house so he can light the appliances,  
4 and test the service --

5 Q. Anything else?

6 A. -- that was required.

7 That's pretty much all we would do, test  
8 the service first. Test the house line, and  
9 light the appliances.

10 Q. Now, in your notes here, it states that you  
11 would leave the number of, 361-2345; is that your  
12 pager number?

13 A. That is the Gas Company's call number for  
14 all call-ins. I would call a different number.  
15 For instance, for Central Dispatch, I have a  
16 direct line for Central Dispatch, okay. The  
17 customer does not have that line. The customer  
18 has the, 361-2345. That's the company line.

19 Q. Your testimony is, you stated you left your  
20 pager number, and in your notes here, you state  
21 you left your main number for them to call?

22 A. Yes, both.

23 Q. You left both of them?

24 A. Yes.

25 Q. And during this time, you never went to a



1 neighbor's house and asked where these people  
 2 were or whatnot?  
 3 A. No. Nobody came out, and I didn't go  
 4 there.  
 5 Q. And you never contacted customer service at  
 6 East Ohio Gas Company to find out where you could  
 7 contact the owners of the house?  
 8 A. No, sir.  
 9 Q. You never contacted the builders of the  
 10 house to find out where the owners were located?  
 11 A. No, sir.  
 12 Q. Other than the telephone receptionist at  
 13 the real estate company, did you ever speak to  
 14 anybody?  
 15 A. No, sir.  
 16 Q. Did you ever meet anybody from Century 21  
 17 Arrow?  
 18 A. No, sir.  
 19 Q. Did you ever fax them any notice?  
 20 A. No, sir.  
 21 Q. Did you ever E-mail Century 21 Arrow?  
 22 A. No, sir.  
 23 Q. Did you ever send a letter to Century 21  
 24 Arrow?  
 25 A. No, sir, no, sir.

1 the 15302 Turney Road address, correct?  
 2 A. Yes, sir.  
 3 Q. Do you know if anyone from Century 21 Arrow  
 4 ever saw these cards?  
 5 A. I don't know.  
 6 Q. When you had called Century 21, allegedly,  
 7 the five or six times that you testified to, did  
 8 you ever ask to speak to the broker?  
 9 A. No, sir.  
 10 Q. Did you ever ask to speak to the person in  
 11 charge?  
 12 A. No, sir.  
 13 Q. And other than the telephone receptionist,  
 14 you spoke to no one?  
 15 A. Spoke to no one.  
 16 MR. LAZZARO: Thank you, very  
 17 much. I have no further questions. I appreciate  
 18 it.  
 19 MR. NUSSLE: I have a few  
 20 follow-up.  
 21 RE-CROSS-EXAMINATION  
 22 BY MR. NUSSLE:  
 23 Q. On Plaintiff's Exhibit F, the letter, I  
 24 just want to make sure, is that your handwriting?  
 25 A. Yes, sir.

1 Q. I notice in your notes here, Exhibit C,  
 2 which is your day-to-day notes?  
 3 A. Yes.  
 4 Q. On your two-page analyzation, Exhibit F --  
 5 A. Yes.  
 6 Q. -- you never mention the realtor's name,  
 7 and I also notice on a letter of February 2, 2000  
 8 from Ms. Peterson to Ms. Dennewitz, she doesn't  
 9 mention the realtor's name.  
 10 When did you find out what the realtor's  
 11 name was?  
 12 A. I found out on the date that I made the  
 13 first call who he was, who had the listing.  
 14 Q. So, any reason why you didn't mark it on  
 15 your ledger what his name was?  
 16 A. I could have forgot.  
 17 Q. Any reason why you didn't note it on your  
 18 analysis dated January 6th?  
 19 A. Could have forgot, because I thought it  
 20 was --  
 21 Q. Any reason why Ms. Peterson didn't mention  
 22 it on February 2nd?  
 23 A. Couldn't tell you. Couldn't answer it.  
 24 Q. You had stated in your previous testimony  
 25 that you had dropped off, left several cards at

1 MR. NUSSLE: And I want to make  
 2 a request, Steve, can we have the log notes for  
 3 the entire project, since we only have the 15th,  
 4 16th, and 17th?  
 5 MR. PRUNESKI: If we can find  
 6 them. We have already looked. Pat, he gave us  
 7 what he had when he did his statement from when  
 8 he retired. We have looked so far and we haven't  
 9 found them.  
 10 MR. NUSSLE: Okay.  
 11 MR. PRUNESKI: We do have project  
 12 notes, if you want those, besides log notes. We  
 13 don't have other log notes at this point.  
 14 MR. NUSSLE: Are they his  
 15 project notes?  
 16 MR. PRUNESKI: No.  
 17 MR. NUSSLE: Whose project notes  
 18 are they; just general?  
 19 MR. PRUNESKI: General notes on  
 20 the project, company reps.  
 21 MR. NUSSLE: You might as well.  
 22 MR. LAZZARO: Send a copy to me,  
 23 I would appreciate it.  
 24 MR. PRUNESKI: Okay.  
 25 BY MR. NUSSLE:



- 1 Q. Was Mr. Amato's name on the Century 21  
2 sign?  
3 A. I do not know, sir. I couldn't answer  
4 that.  
5 Q. I just want to make sure I'm clear on  
6 something, too.  
7 It looks like from your notes here that  
8 15302 was sort of a starting point on the  
9 project; is that a corner lot, then?  
10 A. No, fourth house.  
11 Q. Is this a north, south, east, west house,  
12 do you know?  
13 A. It runs east, west. We were on the south  
14 side and we were east of -- probably, 300 feet  
15 east of Dunham, east of Dunham Road.  
16 Q. So, if I am standing on Turney Road looking  
17 at 15302, okay?  
18 A. Yes, sir.  
19 Q. The house to the right of me, did they have  
20 their gas shut off and re-tied?  
21 A. No. If you are looking at the house?  
22 Q. I am looking at the house.  
23 A. That --  
24 Q. From Turney Road, I'm looking at the  
25 house.

- 1 A. He was the first house. The other house  
2 wasn't interrupted, because that was already on  
3 the project. That was done back in the late  
4 '60s --  
5 Q. Okay.  
6 A. -- for another --  
7 Q. So, the house to the right wasn't affected;  
8 what about the house to the left?  
9 A. The house to the left was, yes.  
10 Q. As well as across the street?  
11 A. No, sir, double main streets.  
12 Q. So, it was only the house on the south  
13 side?  
14 A. South side only.  
15 Q. Now, when -- since I don't have every  
16 address, it looks like it goes upward numerically  
17 in the project?  
18 A. Yes, sir, they would.  
19 Q. Whoever that neighbor is on the left of  
20 15302, okay, whatever number that is, whatever  
21 neighbor that is, their gas got re-tied?  
22 A. To what you are saying, talking to the --  
23 Q. To the left?  
24 A. Yes.  
25 Q. When their gas got re-tied, that means

- 1 someone was at that house?  
2 A. Yes, sir.  
3 Q. That lived at that house?  
4 A. That's correct.  
5 Q. And were you there when that line was  
6 re-tied?  
7 A. Yes, sir.  
8 Q. And do you recall who that person was,  
9 either by name or gender?  
10 A. No, sir.  
11 Q. Okay. But, you did not ask that person,  
12 "What about 15302 Turney"?  
13 A. No, sir. I believe that person went out in  
14 the morning, went to work.  
15 Q. So, it was an early morning tie-in?  
16 A. No. It was one of these things where we  
17 caught them, or her, going out the driveway and  
18 said that whatever we had to do, she would call.  
19 I said, "There would be a card in the door  
20 explaining," and they would call when they got  
21 home. It was not a problem.  
22 Q. Okay. So, you are saying during your time  
23 on the job, the neighbor to the left of 15302  
24 Turney, was not re-connected, but the neighbor  
25 called when they got home, and someone came out?

- 1 A. The house was re-connected during the day  
2 while they were away.  
3 Q. Okay.  
4 A. And I had called Central Dispatch with the  
5 information, like, "18" --  
6 Q. Right.  
7 A. -- "Hold for call, and 90-10."  
8 Q. Right.  
9 A. And left the card, and they would call, and  
10 they would dispatch a vehicle to the house.  
11 Q. So, you are saying that the neighbor made a  
12 call?  
13 A. Made a call, right. I did not have to  
14 call -- I had called in to advise dispatchers of  
15 the condition.  
16 Q. Okay. So, some time on the evening of  
17 December 16, 1999, this unknown neighbor --  
18 A. Yes.  
19 Q. -- called and someone came out --  
20 A. Yes.  
21 Q. -- and did the 90-10 test, and everything  
22 was hooked up?  
23 A. Correct.  
24 Q. Okay. And now, you are saying that that  
25 neighbor, you actually remember catching them in

1 the driveway?  
 2 A. Probably, yeah. I would say, yes.  
 3 Q. Okay. Well, you are guessing?  
 4 A. No. I would say, yes.  
 5 Q. Okay. Now, did you catch that person on  
 6 December 16th?  
 7 A. Probably.  
 8 Q. I don't like, "Probably."  
 9 A. Well, it's hard --  
 10 Q. I know.  
 11 A. -- two years, it is hard to -- what I am  
 12 saying, the card was put on the door. They were  
 13 aware of the fact that they were going to turn  
 14 the gas off. I just happened to be walking the  
 15 job in the morning.  
 16 I walk the job project every day, looking  
 17 for stuff. And people would come out, and some  
 18 people wouldn't. Some people would be going out  
 19 and they would ask you, what you are going to do,  
 20 or the gas would be off, and I would tell them.  
 21 Q. Do you remember talking to this neighbor  
 22 and telling them --  
 23 A. Yes, sir, I do.  
 24 Q. -- the gas would be off on the 16th?  
 25 A. I do.

1  
 2 I, PATRICK A. MARTIN, do verify that I have  
 3 read this transcript consisting of 101 pages and  
 4 have had the opportunity to make corrections.  
 5  
 6  
 7 \_\_\_\_\_  
 8 PATRICK A. MARTIN  
 9  
 10 Sworn to before me, \_\_\_\_\_  
 11 Notary Public  
 12  
 13 this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.  
 14  
 15  
 16 \_\_\_\_\_  
 17 Notary Public  
 18 My commission expires \_\_\_\_\_  
 19 ---  
 20 jjh  
 21  
 22  
 23  
 24  
 25

1 Q. But, you did not ask them, "What about this  
 2 house that's for sale?"  
 3 A. No.  
 4 MR. NUSSLE: Okay. I don't have  
 5 any further questions.  
 6 MR. LAZZARO: I have no further  
 7 questions.  
 8 MR. PRUNESKI: He doesn't waive.  
 9 (Thereupon, the deposition  
 10 was concluded at 2:30 p.m.)  
 11  
 12  
 13  
 14  
 15  
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 24  
 25

1 CERTIFICATE  
 2 STATE OF OHIO, )  
 3 ) SS:  
 4 CUYAHOGA COUNTY, )  
 5 I, Janine J. Howard, a Registered  
 6 Professional Reporter, and Notary Public within  
 7 and for the State of Ohio, duly commissioned and  
 8 qualified, do hereby certify that the within  
 9 named witness, PATRICK A. MARTIN, was by me first  
 10 duly sworn to testify the truth, the whole truth  
 11 and nothing but the truth in the cause aforesaid;  
 12 that the testimony then given by him was by me  
 13 reduced to Stenotype in the presence of said  
 14 witness, afterwards prepared and produced by  
 15 means of Computer-Aided Transcription and that  
 16 the foregoing is a true and correct transcription  
 17 of the testimony so given by him as aforesaid  
 18 I do further certify that this deposition  
 19 was taken at the time and place in the  
 20 foregoing caption specified, and was completed  
 21 without adjournment.  
 22 I do further certify that I am not a  
 23 relative, employee of counsel or attorney for any  
 24 party or counsel, or otherwise financially  
 25 interested in this action.  
 I do further certify that I am not, nor is  
 the court reporting firm with which I am  
 affiliated, under a contract as defined in Civil  
 Rule 28(D).  
 IN WITNESS WHEREOF, I have hereunto set my  
 hand and affixed my seal of office at Cleveland,  
 Ohio on this 16th day of September, 2002.  
 \_\_\_\_\_  
 Janine J. Howard, Registered  
 Professional Reporter, and Notary  
 Public In and for the State of  
 Ohio.  
 My commission expires May 24, 2006.  
 ---  
 24  
 25

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of S.G. Foods, )  
Inc., Pak Yan Lui, and John Summers, )

Complainants, )

v. )

Case No. 04-28-EL-CSS

FirstEnergy Corp., American Transmission )  
Systems, Inc., Ohio Edison Company, and )  
The Cleveland Electric Illuminating Com- )  
pany, )

Respondents. )

In the Matter of the Complaint of Miles Man- )  
agement Corp., Alok Bhajji, M.D., Inc., Union )  
House Bar & Restaurant, and Regional Ther- )  
apy, Inc., )

Complainants, )

v. )

Case No. 05-803-EL-CSS

FirstEnergy Corp. and American Transmis- )  
sion Systems, Inc., )

Respondents. )

In the Matter of the Complaint of Allianz US )  
Global Risk Insurance Company, Lexington )  
Insurance Company, and Royal Indemnity )  
Company, as Subrogees of Republic Engi- )  
neered Products Inc., )

Complainants, )

v. )

Case No. 05-1011-EL-CSS

FirstEnergy Corp., American Transmission )

EXHIBIT

C

Systems, Inc., Cleveland Electric Illuminating )  
 Company, Jersey Central Power and Light )  
 Company, Metropolitan Edison Company, )  
 Ohio Edison Company, Pennsylvania Electric )  
 Company, Toledo Edison Company, and The )  
 Illuminating Company, )

Respondents. )

In the Matter of the Complaint of Lexington )  
 Insurance Company, Frankenmuth Mutual )  
 Insurance Company, Charter Oak Fire Insur- )  
 ance Company, The Automobile Insurance )  
 Company of Hartford, The Standard Fire )  
 Insurance Company, Travelers Indemnity )  
 Company of America, Travelers Indemnity )  
 Company of Connecticut, Travelers Indem- )  
 nity Company, Travelers Property Casualty )  
 Company of America, Phoenix Insurance )  
 Company, St. Paul Mercury Insurance Com- )  
 pany, St. Paul Surplus Lines Insurance Com- )  
 pany, United States Fidelity & Guaranty, )  
 Allied Mutual Insurance Company, and )  
 Nationwide Mutual Insurance, as Subrogees )  
 of Their Insureds, )

Complainants, )

v. )

Case No. 05-1012-EL-CSS

FirstEnergy Corp., American Transmission )  
 Systems, Inc., The Cleveland Electric Illumi- )  
 nating Company, Jersey Central Power and )  
 Light Company, Metropolitan Edison Com- )  
 pany, The Ohio Edison Company, Pennsyl- )  
 vania Electric Company, Toledo Edison )  
 Company, and The Illuminating Company, )

Respondents. )

In the Matter of the Complaint of BMW  
Pizza, Inc. and DPNY, Inc., et al., )

Complainants, )

v. )

FirstEnergy Corp., American Transmission  
Systems, Inc., Ohio Edison Company, The  
Cleveland Electric Illuminating Company,  
The Toledo Edison Company, Pennsylvania  
Power Company, American Electric Power,  
Midwest Independent Transmission System  
Operator, Inc., PJM Interconnection, LLC,  
and John Does 1-100, )

Respondents. )

Case No. 05-1014-EL-CSS

In the Matter of the Complaint of Triple A  
Sport Wears, Inc., )

Complainants, )

v. )

FirstEnergy Corp. and American Transmis-  
sion Systems, Inc., )

Respondents. )

Case No. 05-1020-EL-CSS

In the Matter of the Complaint of Dennis  
Kucinich, )

Complainant, )

v. )

First Energy, on behalf of The Cleveland  
Electric Illuminating Company, Ohio Edison  
Company, and The Toledo Edison Company, )

Case No. 03-1833-EL-CSS

Respondents. )  
 )

### ENTRY

The Commission finds:

- (1) On August 14, 2003, portions of the northeastern part of the United States and the southeastern part of Canada experienced a widespread loss of electrical power (blackout).
- (2) On August 15, 2003, President George W. Bush and then-Prime Minister Jean Chrétien of Canada established a joint U.S.-Canada Power System outage Task Force to establish the cause of the blackout. On March 31, 2004, the task force issued its final report (task force report). The task force determined that the initial events that led to the cascading blackout occurred in Ohio and reported that there were a number of major causes of the blackout, as well as various additional identified problems. (Task Force Report at 17-20, as attached to the October 25, 2004, memorandum contra filed by the S.G. Foods complainants, as defined below.<sup>1</sup>)
- (3) Between August 20, 2003, and August 15, 2005, several complaints were filed with the Commission relating to the blackout. Inasmuch as the issues arising in these complaints overlap to a large extent, the Commission finds that these cases should be consolidated for hearing and ultimate resolution. In this entry, we will first review the current status of each individual case and then will proceed to resolve various procedural issues that have arisen.

#### S.G. Foods Complaint

- (4) On January 12, 2004, S.G. Foods, Inc., Pak Yan Lui, and John Summers (S.G. Foods complainants) filed a complaint in Case No. 04-22-EL-CSS (S.G. Foods complaint), individually and on behalf of all other persons similarly situated, against FirstEnergy Corp. (FE);<sup>2</sup> American Transmission Systems, Inc. (ATSI); Ohio Edison Company (OE); The Cleveland Electric

<sup>1</sup> See finding (62), for a description of the memorandum contra.

<sup>2</sup> Various of the consolidated complaints listed this respondent as FirstEnergy Corporation. According to the answers, the correct name should read FirstEnergy Corp.

Illuminaing Company (CEI); and one hundred unnamed persons (S.G. Foods respondents) alleging, *inter alia*, that the S.G. Foods respondents failed to furnish necessary adequate service and facilities to the S.G. Foods complainants and that the service and/or facilities provided by one or more of the S.G. Foods respondents was at least partially responsible for causing the blackout, thereby causing financial harm to the S.G. Foods complainants. Specifically, the S.G. Foods complainants allege that

- (a) the S.G. Foods respondents breached their legal duty to exercise due care toward the S.G. Foods complainants;
  - (b) FE failed to comply with rules related to its transmission system;
  - (c) the blackout resulted from FE's recklessness, wantonness and/or gross negligence;
  - (d) FE's tree trimming around its transmission lines was reckless, wanton, and grossly negligent;
  - (e) FE's separation of its local system from the remainder of the electric grid was reckless, wanton, and grossly negligent;
  - (f) the S.G. Foods respondents failed to exercise ordinary or slight care and diligence;
  - (g) the S.G. Foods respondents intentionally failed to perform a duty;
  - (h) the actions of S.G. Foods respondents were reckless and wanton;
  - (i) a reasonably prudent utility company would have anticipated likely injuries; and
  - (j) the S.G. Foods respondents' actions proximately caused foreseeable damages suffered by the S.G. Foods complainants.
- (5) Based on these allegations, the S.G. Foods complainants pray for findings that

- (a) the S.G. Foods respondents failed to furnish necessary and adequate service and facilities;
  - (b) the service and/or facilities of one or more of the S.G. Foods respondents was at least partially responsible for the blackout;
  - (c) an order certifying the complaint as a class action;
  - (d) reasonable attorneys' fees and costs; and
  - (e) other just and proper relief.
- (6) On February 2, 2004, the S.G. Foods respondents filed an answer, denying many of the allegations in the S.G. Foods complaint and raising several affirmative defenses. Among those defenses is the assertion that the Commission has no authority to hear class actions.
- (7) By entry dated August 12, 2004, the attorney examiner denied the class action issues in the S.G. Foods complaint and dismissed the one hundred unnamed respondents.
- (8) On October 15, 2004, the S.G. Foods respondents filed a motion to preclude the admission of the task force report into evidence in this proceeding and to preclude any expert from rendering opinions based upon the task force report. The S.G. Foods complainants filed a memorandum contra that motion on October 22, 2004, and the S.G. Foods respondents filed a reply memorandum on October 29, 2004. The motion is pending.

### Miles Complaint

- (9) On July 11, 2005, Miles Management Corp., Alok Bhaiji, M.D., Inc., Union House Bar & Restaurant, and Regional Therapy, Inc. (Miles complainants), filed a complaint in Case No. 05-803-EL-CSS (Miles complaint), individually and on behalf of all other persons similarly situated, against FE and ATSI (Miles respondents), alleging, *inter alia*, that the Miles respondents caused and/or permitted the blackout, thereby causing substantial losses on the part of the Miles complainants. Specifically, the Miles complainants allege that,
- (a) as a direct and proximate result of the Miles respondents' failure to abide by the common law standard of



due care, the Miles complainants have suffered substantial damages;

- (b) as a direct and proximate result of the Miles respondents' reckless disregard and indifference, the Miles complainants have suffered substantial damages;
- (c) as a direct and proximate result of the Miles respondents' breach of express and/or implied warranties and agreements, the Miles complainants have suffered substantial damages; and
- (d) as a direct and proximate result of the Miles respondents' failure to comply with regulatory and statutory obligations, the Miles complainants have suffered substantial damages.

(10) Based on these allegations, the Miles complainants pray for

- (a) an award of treble damages under Section 4905.61, Revised Code; and
- (b) such other relief as the Commission is authorized to grant, including, legal fees, pre-judgment interest, punitive damages, appropriate equitable and declaratory relief, and costs of this action.

(11) On July 11, 2005, the Miles respondents filed an answer to the Miles complaint, denying numerous of the allegations in the Miles complaint and raising several affirmative defenses. Among those defenses are the assertions that

- (a) the Commission has no authority to hear class actions;
- (b) FE is not a public utility and, therefore, the Commission has no jurisdiction over it; and
- (c) the Miles respondents lack standing to bring the Miles complaint.

(12) By entry dated July 13, 2005, the attorney examiner denied the class action issues in the Miles complaint.

**Allianz Complaint**

- (13) On August 15, 2005, Allianz US Global Risk Insurance Company, Lexington Insurance Company, and Royal Indemnity Company, as Subrogees of Republic Engineered Products Inc. (Allianz complainants), filed a complaint in Case No. 05-1011-EL-CSS (Allianz complaint) against FE, ATSI, CEI, Jersey Central Power and Light Company (Jersey), Metropolitan Edison Company (Metropolitan), OE, Pennsylvania Electric Company (Pennsylvania), Toledo Edison Company (TE), and the Illuminating Company (collectively, Allianz respondents), alleging, *inter alia*, that the Allianz respondents violated Section 4933.83 and 4905.26, Revised Code, thereby causing or contributing to the blackout, and causing losses on the part of the Allianz complainants. Specifically, the Allianz complainants allege that,
- (a) as a direct and proximate result of the Allianz respondents' violation of their duties under Section 4933.83(b), Revised Code, to furnish adequate facilities, an entity insured by the Allianz complainants suffered certain losses, thereby causing damages to the Allianz complainants as insurers;
  - (b) as a direct and proximate result of the Allianz respondents' violation of their duties under Section 4905.26, Revised Code, to provide reasonable, sufficient, and adequate service, an entity insured by the Allianz complainants suffered certain losses, thereby causing damages to the Allianz complainants as insurers;
  - (c) as a direct and proximate result of the Allianz respondents' reckless, wanton, and grossly negligent breach of their duty to exercise reasonable care, an entity insured by the Allianz complainants suffered certain losses, thereby causing damages to the Allianz complainants as insurers; and
  - (d) as a direct and proximate result of the Allianz respondents' grossly negligent breach of their duty to exercise reasonable care, an entity insured by the Allianz complainants suffered certain losses, thereby causing damages to the Allianz complainants as insurers.

- (14) Based on these allegations, the Allianz complainants pray for

- (e) a statutory finding of a violation of Section 4933.83 or 4905.26, Revised Code;
  - (f) a finding that the negligence or gross negligence of one or more of the Allianz respondents caused or contributed to the blackout;
  - (g) a statutory finding pursuant to Section 4905.61, Revised Code, that one or more of the Allianz respondents' violations of Chapters 4905 or 4933, or other provision of Title 49, Revised Code, proximately caused the blackout;
  - (h) an award of fees, expenses, and costs of this action pursuant to Section 4903.24, Revised Code; and
  - (i) such other relief as the Commission may deem just and proper.
- (15) On September 27, 2005, the Allianz complainants filed a notice of voluntary dismissal of Metropolitan, Jersey, and Pennsylvania.
- (16) On October 4, 2005,<sup>3</sup> the Allianz respondents filed an answer, denying numerous of the allegations in the Allianz complaint and raising several affirmative defenses. Among those defenses are the assertions that
- (a) FE is not a public utility and, therefore, the Commission has no jurisdiction over it;
  - (b) the Commission lacks jurisdiction to award certain types of relief requested in the Allianz complaint;
  - (c) the Allianz respondents lack standing to bring the Allianz complaint; and
  - (d) subrogation claims violate public policy.
- (17) On January 13, 2006, the Allianz respondents filed a motion to dismiss on grounds that
- (a) any claim under Section 4933.83, Revised Code, must fail, as the Allianz complaint makes allegations related

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<sup>3</sup> The attorney examiner allowed an extension of time to file the answer.

to transmission facilities and the cited section applies only to distribution facilities and only in a context that is completely different than the present proceeding;

- (b) simply alleging that a single outage occurred is not sufficient to show inadequate service under Section 4905.22, Revised Code; and
  - (c) public policy requires that a subrogation claim be dismissed as ratepayers would then be paying for both insurance premiums and the liability that the insurance was designed to cover.
- (18) On February 10, 2006,<sup>4</sup> the Allianz complainants filed a memorandum contra the motion to dismiss. In that memorandum, the Allianz complainants contend that FE is subject to the jurisdiction of the Commission; that the motion to dismiss is untimely; that the Allianz complaint adequately states a claim for inadequate service under Section 4933.81, 4933.83, or 4905.26, Revised Code; that the negligence and gross negligence claims in the Allianz complaint are appropriately before the Commission; and that the action by the Allianz complainants, as subrogees, does not violate public policy.
- (19) On February 21, 2006, the Allianz respondents filed a reply memorandum further addressing the issues in the memorandum contra.

### Lexington Complaint

- (20) On August 15, 2005, Lexington Insurance Company, Frankenthuth Mutual Insurance Company, Charter Oak Fire Insurance, The Automobile Insurance Company of Hartford, The Standard Fire Insurance Company, Travelers Indemnity Company of America, Travelers Indemnity Company of Connecticut, Travelers Indemnity Company, Travelers Property Casualty Company of America, Phoenix Insurance Company, St. Paul Mercury Insurance Company, St. Paul Surplus Lines Insurance Company, United States Fidelity & Guaranty, Allied Mutual Insurance Company, and Nationwide Mutual Insurance, As Subrogees of Their Insureds (Lexington complainants), filed a complaint in Case No. 05-1012-EL-CSS (Lexington complaint)

<sup>4</sup> The attorney examiner granted an extension of time to file the memorandum contra.

against FE, ATSI, CEI, Jersey, Metropolitan, OE, Pennsylvania, TE, and The Illuminating Company (Lexington respondents), alleging, *inter alia*, that the respondents violated Section 4933.83 and 4905.26, Revised Code, thereby causing or contributing to a the blackout, and causing losses on the part of the Lexington complainants. Specifically, the Lexington complainants allege that,

- (a) as a direct and proximate result of the Lexington respondents' violation of their duties under Section 4933.83(b), Revised Code, to furnish adequate facilities, entities insured by the Lexington complainants suffered certain losses, thereby causing damages to the Lexington complainants as insurers;
  - (b) as a direct and proximate result of the Lexington respondents' violation of their duties under Section 4905.26, Revised Code, to provide reasonable, sufficient, and adequate service, entities insured by the Lexington complainants suffered certain losses, thereby causing damages to the Lexington complainants as insurers;
  - (c) as a direct and proximate result of the Lexington respondents' reckless, wanton, and grossly negligent breach of their duty to exercise reasonable care, entities insured by the Lexington complainants suffered certain losses, thereby causing damages to the Lexington complainants as insurers; and
  - (d) as a direct and proximate result of the Lexington respondents' grossly negligent breach of their duty to exercise reasonable care, entities insured by the Lexington complainants suffered certain losses, thereby causing damages to the Lexington complainants as insurers.
- (21) Based on these allegations, the Lexington complainants pray for
- (a) a statutory finding of a violation of Section 4933.83 or 4905.26, Revised Code;
  - (b) a finding that the negligence or gross negligence of one or more of the Lexington respondents caused or contributed to the blackout;

- (c) a statutory finding pursuant to Section 4905.61, Revised Code, that one or more of the Lexington respondents' violations of Chapter 4905, 4933, or other provision of Title 49, Revised Code, proximately caused the blackout;
  - (d) an award of fees, expenses, and costs of this action pursuant to Section 4903.24, Revised Code; and
  - (e) such other relief as the Commission may deem just and proper.
- (22) On September 27, 2005, the Lexington complainants filed a notice of voluntary dismissal of Metropolitan, Jersey, and Pennsylvania.
- (23) On October 4, 2005,<sup>5</sup> the Lexington respondents filed an answer, denying numerous of the allegations in the Lexington complaint and raising several affirmative defenses. Among those defenses are the assertions that
- (f) FE is not a public utility and, therefore, the Commission has no jurisdiction over it;
  - (g) the Commission lacks jurisdiction to award certain types of relief requested in the Lexington complaint;
  - (h) the Lexington complainants lack standing to bring the Lexington complaint; and
  - (i) subrogation claims violate public policy.
- (24) On January 13, 2006, the Lexington respondents filed a motion to dismiss on grounds that
- (a) any claim under Section 4933.83, Revised Code, must fail, as the Lexington complaint makes allegations related to transmission facilities and the cited section applies only to distribution facilities and only in a context that is completely different than the present proceeding;

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<sup>5</sup> The attorney examiner allowed an extension of time to file the answer.

- (b) simply alleging that a single outage occurred is not sufficient to show inadequate service under Section 4905.22, Revised Code; and
  - (c) public policy requires that a subrogation claim be dismissed as ratepayers would then be paying for both insurance premiums and the liability that the insurance was designed to cover.
- (25) On February 10, 2006,<sup>6</sup> the Lexington complainants filed a memorandum contra the motion to dismiss. In that memorandum, the Lexington complainants contend that FE is subject to the jurisdiction of the Commission; the motion to dismiss is untimely; the Lexington complaint adequately states a claim for inadequate service under Section 4933.81, 4933.83, or 4905.26, Revised Code; the negligence and gross negligence claims in the Lexington complaint are appropriately before the Commission; and the action by the Lexington complainants, as subrogees, does not violate public policy.
- (26) On February 21, 2006, the Lexington respondents filed a reply memorandum further addressing the issues in the memorandum contra.

### **BMW Complaint**

- (27) On August 15, 2005, BMW Pizza, Inc. & DPNY, Inc., and 529 other named persons or entities (BMW complainants),<sup>7</sup> filed a complaint in Case No. 05-1014-EL-CSS (BMW complaint) against FE; ATSI; OE; CEI; TE; Pennsylvania; American Electric Power (AEP); Midwest Independent Transmission System Operator, Inc. (MISO); PJM Interconnection, LLC (PJM); and John Does 1-100 (BMW respondents), alleging, *inter alia*, that the BMW respondents failed to abide by various provisions of chapters 4901, 4902, 4905, 4909, and 4933 of the Revised Code, thereby causing a power outage that occurred on August 14, 2003, and causing losses on the part of the BMW complainants. Specifically, the BMW complainants allege, *inter alia*, that

<sup>6</sup> The attorney examiner granted an extension of time to file the memorandum contra.

<sup>7</sup> A complete list of these complainants may be found in the Commission's website, on the following page: <http://dis.puc.state.oh.us/CMPDFs/ZYCRBK01RLLQ8P62.pdf>.

- (a) as a direct and proximate result of the BMW respondents' negligence, the BMW complainants suffered damages and losses;
  - (b) as a direct and proximate result of the BMW respondents' willful, wanton, and reckless conduct, the BMW complainants suffered damages and losses;
  - (c) as a direct and proximate result of the BMW respondents' breach of express and/or implied warranties and agreements, which agreements arose separate and apart from any rights or obligations imposed by any governmental law, regulation, or other authority directed to utilities, the BMW complainants suffered damages and losses; and
  - (d) as a direct and proximate result of the BMW respondents' failure to comply with their regulatory and statutory obligations, including but not limited to those imposed by the Commission and those codified in Chapters 4901, 4903, 4905, 4909, and 4933, Revised Code, the BMW complainants suffered damages and losses.
- (28) Based on these allegations, the BMW complainants pray for
- (a) an award of treble damages under Section 4905.61, Revised Code; and
  - (b) such other relief as the BMW complainants and their counsel are entitled to receive, including legal fees, litigation expenses, pre-judgment interest, punitive damages, appropriate equitable and declaratory relief, and costs of this action.
- (29) On September 12, October 6, and October 7, 2005,<sup>8</sup> the BMW respondents filed answers, denying numerous of the allegations in the BMW complaint and raising several affirmative defenses. Specifically, the BMW respondents made the following filings:

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<sup>8</sup> The attorney examiner allowed an extension of time to file the answer.



(a) FE and its named subsidiaries filed their answer on October 6, 2005. Among their affirmative defenses are the assertions that

1. FE is not a public utility and, therefore, the Commission has no jurisdiction over it;
2. the Commission lacks jurisdiction to award certain types of relief requested in the BMW complaint; and
3. FE and its named subsidiaries owed no legal duty to any BMW complainants who were not its customers;
4. certain of the BMW respondents lack standing to bring the Lexington complaint;
5. subrogation claims violate public policy; and
6. the BMW complainants failed to properly plead subrogation claims.

(b) AEP filed its answer on September 12, 2005.<sup>9</sup> Among its affirmative defenses are the assertions that

1. the BMW complainants lack standing;
2. the Commission cannot award monetary damages as requested in the BMW complaint;
3. the Commission lacks jurisdiction over the parent company, American Electric Power Company, Inc., for purposes of this complaint;
4. the Commission lacks jurisdiction over "John Does 1-100" if those individuals are intended to represent employees of AEP; and
5. AEP owed no legal duty to the BMW complainants.

(c) MISO filed its answer on October 7, 2005. Among its affirmative defenses are assertions that

<sup>9</sup> In its answer, AEP noted that it is assuming that the BMW respondents intended to name Columbus Southern Power Company (CSP) and Ohio Power Company (OP), rather than AEP, their parent company. Therefore, the answer is filed by AEP, CSP, and OP, collectively. In this entry, the term "AEP" shall refer to all three entities.

1. the Commission lacks jurisdiction over MISO;
  2. the Commission lacks jurisdiction over "John Does 1-100" if those individuals are intended to represent employees of MISO;
  3. the BMW complainants lack standing; and
  4. MISO owes no legal duty to the BMW complainants.
- (d) PJM filed its answer on October 7, 2005. Among its affirmative defenses are assertions that
1. the Commission lacks jurisdiction over PJM;
  2. the BMW complainants lack standing to bring claims against PJM; and
  3. PJM owes no duties to the BMW complainants.
- (30) AEP, MISO, and PJM filed motions to dismiss the BMW complaint against them, on September 12, October 7, and October 26, 2005, respectively. On November 7, 2005, the BMW complainants filed a motion to dismiss their complaint against AEP, MISO, and PJM. That motion is unopposed and should be granted.<sup>10</sup>
- (31) On January 13, 2006, FE and its named subsidiaries filed a motion to dismiss the BMW complaint on grounds, *inter alia*, that
- (a) FE is not a public utility and therefore cannot be liable for allegedly failing to provide utility service;
  - (b) Pennsylvania is not subject to Commission jurisdiction as it does not render service in Ohio;
  - (c) non-customers may not bring claims for losses;
  - (d) many of the BMW complainants are not adequately identified;
  - (e) the BMW complaint fails to allege necessary facts; and

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<sup>10</sup> For the remainder of this entry, the term "BMW respondents" shall not include AEP, MISO, or PJM.

(f) the relief sought is contrary to public policy.

- (32) On February 13, 2006, the BMW complainants filed a memorandum contra the FE motion to dismiss,<sup>11</sup> disputing each of the respondents' arguments. On February 21, 2006, FE filed a reply to the memorandum contra. The motion is pending.

### Triple A Complaint

- (33) On August 15, 2005, Triple A Sport Wears, Inc. (Triple A), filed a complaint in Case No. 05-1020-EL-CSS (Triple A complaint) against FE and ATSI (Triple A respondents), alleging, *inter alia*, that the Triple A respondents breached their statutory obligations to furnish necessary and adequate service and facilities to Triple A, resulting in the blackout and the occurrence of a robbery at Triple A's business. Specifically, the Triple A complainants allege, *inter alia*, that,
- (a) as a proximate result of the Triple A respondents' breach of their duty to exercise due care, Triple A suffered injuries; and
  - (b) as a result of the Triple A respondents' recklessness, wantonness, negligence, and/or gross negligence in failing to meet certain standards and practices in the industry, Triple A suffered injuries.
- (34) Based on these allegations, Triple A prays for
- (a) a statutory finding that one or more of the Triple A respondents failed to furnish necessary and adequate service and facilities to Triple A;
  - (b) a statutory finding that service and/or facilities provided by one or more of the Triple A respondents was at least partially responsible for the blackout;
  - (c) for reasonable attorneys' fees and the costs of this action; and
  - (d) such other relief as the Commission may deem just and proper.

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<sup>11</sup> The attorney examiner granted an extension of time to file the response.

- (35) On September 6, 2005, the Triple A respondents filed an answer, denying numerous of the allegations in the Triple A complaint and raising several affirmative defenses. Among those defenses are the assertions that
- (a) FE is not a public utility and, therefore, the Commission has no jurisdiction over it;
  - (b) the Commission lacks jurisdiction to award certain types of relief requested in the Triple A complaint;
  - (c) the Triple A respondents owed no legal duty to Triple A; and
  - (d) Triple A lacks standing to bring the Triple A complaint.
- (36) On September 6, 2005, the Triple A respondents also filed a motion to dismiss the Triple A complaint on the grounds that
- (a) FE is not a public utility and, therefore, the Commission has no jurisdiction over it; and
  - (b) ATSI owes no legal duty to Triple A.
- (37) On September 27, 2005, Triple A filed a memorandum contra the motion to dismiss.<sup>12</sup> The Triple A respondents filed a reply on October 5, 2005. The motion is pending.

#### Kucinich complaint

- (38) On August 20, 2003, Dennis Kucinich filed a complaint (Kucinich complaint) against FE, on behalf of its subsidiaries, CEI, OE, and TE (Kucinich respondents). In the complaint, Mr.

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<sup>12</sup> The Commission would point out that this memorandum contra was filed out of time and was procedurally defective. The motion to dismiss was filed on September 6, 2005. Rule 4901-1-12, Ohio Administrative Code (O.A.C.) allows the filing of a memorandum contra within 15 days after service. Rule 4901-1-07, O.A.C., allows an additional three days where service was made by mail, as occurred in this circumstance. That rule also extends the due date where that due date would otherwise fall on a weekend or legal holiday. In this circumstance, the memorandum contra was due on Monday, September 26, 2005. In addition, Rule 4901-1-02(B)(8), O.A.C., provides that documents may be filed by facsimile transmission, as was done here, only if the original is delivered to the Commission no later than the next business day. The original of this document was not provided until two days after facsimile transmission. Although the Commission will waive these defects in this particular circumstance, we would caution the parties to comply with the Commission's rules and the orders of the attorney examiner.

Kucinich alleges that he is a member of the United States Congress, representing numerous individuals who reside in the CEI service territory, and also is, himself, a resident of the CEI service territory. Mr. Kucinich argues, *inter alia*, that the respondents have failed to provide physically adequate service, resulting in the blackout. Specifically, Mr. Kucinich alleges that

- (a) the Kucinich respondents failed to provide physically adequate service, as required by Section 4933.83, Revised Code;
  - (b) the Kucinich respondents failed to provide necessary and adequate service, as required by Section 4905.22, Revised Code; and
  - (c) the Kucinich respondents failed to comply with their transition plans, resulting in the necessity to redetermine proper stranded investments and shopping credits.
- (39) Based on these allegations, Mr. Kucinich prays for
- (a) a finding that the Kucinich respondents have not provided reasonable and adequate service as required by Chapter 49, Revised Code;
  - (b) a finding that the Kucinich respondents have not furnished adequate facilities to meet the reasonable needs of consumers and inhabitants in the certified territory, as required by Section 4933.83, Revised Code;
  - (c) authorization for another electric supplier to furnish electric service in the territories of the Kucinich respondents, and amendment of the maps of the certified territories; and
  - (d) such other relief as is justified.
- (40) On September 15, 2003, the Kucinich respondents timely filed an answer to the Kucinich complaint, denying numerous of the allegations in the Kucinich complaint and raising several affirmative defenses. Among those defenses are the assertions that
- (a) the Commission has no jurisdiction over FE;

- (b) Mr. Kucinich is not a customer of any of the Kucinich respondents and therefore lacks standing to maintain a claim against them;
  - (c) Mr. Kucinich lacks standing to assert any claim on behalf of others;
  - (d) the Commission lacks jurisdiction to authorize another electric supplier to serve the Kucinich respondents' territory, except after compliance with certain procedural requirements; and
  - (a) modification of their territories would be unconstitutional.
- (41) On September 24, 2003, a motion to intervene and a purported secondary complaint were filed in this same docket, by the Neighborhood Environmental Coalition (Coalition) and the Consumers for Fair Utility Rates (Consumers), against the Kucinich respondents, and also against FE itself. Coalition and Consumers assert that the Kucinich respondents and FE failed to provide necessary and adequate service, as required by Section 4905.22, Revised Code, and failed to charge just and reasonable charges, as required by Section 4905.22, Revised Code. Coalition and Consumers therefore request that the Commission investigate the causes of the blackout and ensure that the transmission lines and system of the Kucinich respondents and FE are maintained and integrated so as to provide safe, reliable, efficient, and low-cost electric utility services. They ask that the Commission appoint independent hearing masters to conduct the needed investigation of both the Kucinich respondents and FE and, also, the activities of the Commission itself. Coalition and Consumers demand that the Commission find that necessary and adequate service has not been provided, that charges have been unreasonable and unjust, and that the Commission order the payment of compensation and punitive damages in the amount of at least 1,000 dollars to each customer of the Kucinich respondents and FE. Finally, they ask that the various other operational changes be ordered by the Commission.
- (42) On October 14, 2005, the Kucinich respondents filed a memorandum contra the intervention of Coalition and Consumers, as well as a request for the dismissal of FE based on the

Commission's lack of jurisdiction over it. The Kucinich respondents assert, *inter alia*, that

- (a) the Coalition and Consumers intervention would be the functional equivalent of a class action;
- (b) the motion and complaint do not state whether the individuals in Coalition and Consumers have consented to the action;
- (c) the motion and complaint do not satisfactorily identify the individuals in Coalition and Consumers;
- (d) there is no Commission precedent for allowing an organization or advocacy group to prosecute the interests of unnamed members in a proceeding such as this one; and
- (e) Coalition and Consumers lack standing as customers themselves and have not demonstrated the standing of their members.

(43). On November 13, 2003, Coalition and Consumer filed a reply to the memorandum contra their motion to intervene. They indicate that

- (a) Coalition and Consumers fall within the definition of a "person" under Rule 4901-1-01(J), O.A.C.
- (b) there is no requirement that individual customers be named in a complaint;
- (c) there is no requirement that a corporation document its authority to act; and
- (d) there is no authority that a complainant be a customer of the utility against whom it is complaining.

(44) The motion to intervene is pending.

#### Commission Jurisdiction

(45) Many of the consolidated complaints include allegations and causes of actions that are identified by the complainants as tort or breach of contract claims. This Commission is a creature of

statute and has only the authority given to it by the legislature. That statutory authority includes the power to determine service-related complaints under the provisions of Section 4905.26, Revised Code. The Commission does not have any jurisdiction over complaints that sound purely in tort or breach of contract.

- (46) However, just because a complainant identifies a cause of action in a particular manner does not necessarily mean that such a claim is or is not within the exclusive jurisdiction of the Commission. *State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St.3d 349 (2004) (para. 18-19); *State ex rel. the Illuminating Company v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St.3d 69 (2002) (para. 21). Rather, the Ohio Supreme Court has instructed that an analysis of the claims be undertaken to determine whether the substance of the complaint is manifestly service-related. *Henson* at para. 20, and cases cited therein.
- (47) The Commission finds that, although many of the causes of actions are expressly described as negligence or contract actions, on the face of the consolidated complaints it appears that all of the claims arise from complainants' assertions that respondents failed to provide appropriate service or facilities at the time of the blackout. Thus, we will not at this point dismiss any of the complaints on this jurisdictional ground. However, it should be noted that, if, during the course of these proceedings, we determine that certain claims are outside of our jurisdiction, we will then dismiss such claims. In addition, parties should be aware that this Commission will consider all complaints from the standpoint of the respondents' compliance with various statutes found within Title 49 of the Revised Code, as well as the administrative rules promulgated thereunder and the applicable tariffs.

#### Standing of Complainants

- (48) Complainants in the consolidated cases fall into several categories: (a) customers and consumers within the Ohio certified service territory of the Ohio electric utility company named as a respondent; (b) customers or consumers within the Ohio certified service territory of an Ohio electric utility company, but who do not take distribution service from the respondent utility; (c) residents of another state who are neither customers of the named respondent nor consumers of electricity supplied by



the named respondent; (d) persons for whom the Commission has no information regarding customer and/or consumer status; and (e) insurers of any of the preceding categories. In many of the consolidated cases, the respondents argue that the complainants have no standing to bring service quality complaints before the Commission, on the grounds of customer or consumer status. The respondents in several of the consolidated cases have argued that the complaints by any complainants other than those in the first category (that is, those who are Ohio customers or consumers of a respondent) should be dismissed.

- (49) The Commission's jurisdiction is statutory. Therefore, the determination of the standing necessary for a potential complainant to file an action before the Commission must be based on a close reading of applicable statutes. Section 4905.22, Revised Code, requires every "public utility" to furnish "necessary and adequate service and facilities" and to furnish, with respect to its business, "such instrumentalities and facilities as are adequate and in all respects just and reasonable." This section does not include any limitation regarding the identification of the persons to whom such items must be provided. Similarly, Section 4905.26, Revised Code, allows "any person, firm, or corporation" to file a complaint against any public utility regarding its service. Complainants are not required by that section to fall within any particular category. Thus, it would appear from a reading of only these two sections that, for example, a consumer in New York could file a complaint before the Commission regarding the service of CEI. However, the reading must be more complete.
- (50) The complaint that is authorized in Section 4905.26, Revised Code, must be against a "public utility," just as it is only "public utilities" that are required to provide adequate service. Section 4905.02, Revised Code, supplies the definition of the term "public utility," limiting that term to "every corporation . . . defined in section 4905.03 of the Revised Code . . ." Section 4905.03, Revised Code, sets forth a list of the specific types of entities that are deemed to be public utilities for purposes of Title 49. The relevant subsection provides that a "public utility" may be "an electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric

transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission . . . ." Section 4905.03(A)(4), Revised Code (emphasis added). Thus, a company is only a public utility when it is supplying electricity or transmission services to consumers within the state of Ohio.

- (51) Returning to Section 4905.26, Revised Code, with an understanding of the definition of the term "public utility," we now can more thoroughly understand the legislature's authorization for the filing of complaints before the Commission. This section provides that any person can file a complaint before the Commission only against a "public utility," which is, by definition, a utility when it is supplying electricity, which includes transmission service, to consumers in Ohio. While it is not a model of clarity, the Commission reads this language to limit the Commission's jurisdiction to hearing service-quality complaints by customers of Ohio utilities and consumers of electricity in Ohio, against the providers of that electricity. In the event of a complaint by any other category of person, the respondent would not be in the business of supplying electricity to a consumer within this state. In reaching this conclusion, the Commission is also cognizant of Section 4905.05, Revised Code, which specifically limits the scope of our jurisdiction to intra-Ohio business activities.
- (52) Unfortunately, the Miles complaint, the Allianz complaint, the Lexington complaint, the BMW complaint, the Triple A complaint, and the Kucinich complaint do not clearly set forth the complainants' status as Ohio customers or consumers at the time of the blackout, or the aspect of the respondents' service about which complaint is being made. Therefore, the Commission will allow any of the complaints in the consolidated cases to be appropriately amended, within 14 days of the date of the entry. Following that date, the complaint by any complainant that is not clearly identified as an Ohio customer or consumer will be dismissed. Similarly, the complainants must identify the Ohio electric light company that provides their service.
- (53) In certain of the consolidated cases, the complainants are insurance companies, bringing actions in subrogation, based upon damages allegedly suffered by their insureds. For such actions to be appropriate, the insured entity should be one who could,

in its own right, file a complaint under the parameters previously set forth. In addition, both the insurance company and the insured should be named complainants. See, for e.g., *The Northwestern Ohio Natural Gas Co. v. The First Congregational Church of Toledo, Ohio, et al.*, 126 Ohio St. 140, 184 N.E. 112 (1933); *In the Matter of the Complaint of Curtis and Phillis Petersen, by State Farm Fire & Casualty Company as subrogee v. The Cleveland Electric Illuminating Company*, Case No. 03-832-EL-CSS, Entry (June 10, 2003); *In the Matter of the Complaint of the Erie Insurance Company v. American Electric Power, Inc.*, Case No. 01-2725-EL-CSS, Entry (November 20, 2001). The Commission will allow any of the complaints by insurance companies in the consolidated cases to be appropriately amended, within 14 days of the date of this entry.

- (54) The BMW complainants included, among the respondents, one hundred unnamed respondents. As a creature of statute, the Commission has only that jurisdiction which is granted to it. Inasmuch as the BMW complainants have given the Commission no grounds to believe the unnamed individuals either are public utilities or are otherwise designated by statute for regulation by the Commission, the unnamed persons will be dismissed as party respondents.
- (55) One final issue relating to standing of the complainants arises in the Kucinich case. There, Coalition and Consumers seek to intervene or, apparently, based on their filing of both a motion for intervention and what purports to be a secondary "complaint," to become complainants together with Mr. Kucinich. It is unclear from the face of the "complaint" whether these groups intend to complain only on their own behalf or also on behalf of their members, as the "complaint" filed by the groups recites the impact of the blackout on their members. The Kucinich respondents argue that an advocacy group should not be permitted to pursue a claim on behalf of unnamed members. The Kucinich respondents suggest several rationales for their argument, including the fact that this approach would allow the practical equivalent of a class action. Coalition and Consumers respond that they are complaining on their own behalf.
- (56) The Commission's rules do not allow for the filing of a second complaint in an ongoing proceeding, by unrelated entities. Therefore, the "complaint" by Coalition and Consumers should

be dismissed without prejudice. In the event the Coalition and Consumers choose to file a separate complaint, such complaint should clearly set forth that such complaint is made on behalf of the groups and that such groups are the real parties in interest. In the event that Coalition and Consumers desire to arrange for the filing of a complaint by any of their members, then such members shall be specifically named as complainants. As was discussed previously in the S.G. Foods case, the Commission does not have the authority to hear class action complaints (see finding 7). With regard to the motion to intervene filed by Coalition and Consumers, the Commission will not rule until it is determined whether or not the Kucinich complaint will be dismissed.

#### **Jurisdiction over Respondents**

- (57) Among the various respondents in the consolidated cases are holding companies and regional transmission organizations. As discussed above, the Commission has jurisdiction to hear complaints against public utilities in the state of Ohio, as such term is defined in Section 4905.02, Revised Code. Regional transmission organizations such as PJM and MISO are specifically excluded from the definition, under Section 4905.03(A)(4), Revised Code. Holding companies such as FE and AEP are not engaged in the business of supplying electricity to consumers and, thus, are not subject to our jurisdiction for purposes of service-quality complaints. Companies that are in the business of providing power in states other than Ohio are also not within the definition of a "public utility" and are, also, outside of our jurisdiction. Therefore, each of these respondents should be dismissed. Appropriate amendment of complaints to substitute correct entities as respondents will be permitted within 14 days following the issuance of this entry. The Commission also notes that, in certain of the cases, the complainants have moved to dismiss such parties as respondents. Those motions will be granted.

#### **Admissibility of Evidence**

- (58) In a prehearing conference on October 5, 2004, the S.G. Foods complainants informed the attorney examiner and the S.G. Foods respondents that they intend to introduce the task force report into evidence without the testimony of any witness. In

light of that intention, the S.G. Foods respondents filed a Motion to Exclude Evidence, together with a supportive memorandum (S.G. Foods motion to exclude). In that motion to exclude, the S.G. Foods respondents ask that the Commission (a) preclude the admission of the task force report and (b) preclude any expert from rendering opinions based upon the task force report.

- (59) With regard to the preclusion of the task force report itself, the S.G. Foods respondents state that the S.G. Foods complainants intend to use only the task force report, without presenting any live witnesses, "to make [their] case of inadequate service." They suggest that the task force report would be hearsay, as it is proposed to be used. They assert that such hearsay would be inadmissible if it does not fall within any exception to the hearsay rules.
- (60) Before continuing to summarize the arguments of the parties, the Commission would note that, under the Ohio Rules of Evidence, hearsay is not admissible as evidence in a court of law unless it falls under an exception. Rules 802, 803, Ohio Rules of Evidence (ORE). Rule 803, ORE, sets forth numerous exceptions, including one, Rule 803(8), related to public records and reports. That exception provides for the admissibility of the following:

Records, reports, statement, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

The model rules of evidence, and those adopted in most other jurisdictions, including the rules for federal courts, also include one other subsection which is not in place in Ohio. Under Rule 803(8)(c) of those model rules, admissible government documents also include, "factual findings resulting from an investigation made pursuant to authority granted by law." Such investigative reports are generally held not to be admissible in

Ohio courts. *Cincinnati Insurance Co. v. Volkswagen of America, Inc.*, 41 Ohio App. 3d 239 (Franklin Cty. 1987); *State v. Humphries*, 79 Ohio App. 3d 589 (Clermont Cty. 1992); *Pool v. Wade*, 115 Ohio App. 3d 449 (Lucas Cty. 1996).

- (61) The S.G. Foods respondents argue that the task force report should be excluded because it does not fall within the hearsay exception set forth in Rule 803(8), ORE, inasmuch as (a) the task force itself was not a public office or agency, (b) the statements in the task force report do not relate to matters observed pursuant to a duty imposed by law as to which matter there was a duty to report, and (c) the circumstances underlying the task force report indicate a lack of trustworthiness.
- (62) On October 25, 2004, the S.G. Foods complainants filed a memorandum in opposition to S.G. Foods respondents' motion (complainants' memorandum contra). S.G. Foods complainants argue, *inter alia*, as follows:
- (a) The Commission is not bound by rules of evidence. The S.G. Foods complainants explain that hearsay rules are designed to exclude evidence, not because it is not relevant or probative, but because of concerns regarding jurors' inability to weigh evidence appropriately. This concern, according to the S.G. Foods complainants, is inapplicable to administrative proceedings before the Commission (S.G. Foods complainants' memorandum contra at 9-12).
  - (b) The S.G. Foods complainants assert that the task force is a public office or agency (S.G. Foods complainants' memorandum contra at 13-16).
  - (c) The task force report does set forth matters observed pursuant to a duty imposed by law as to which there was a duty to report, according to the S.G. Foods complainants (S.G. Foods complainants' memorandum contra at 16-20).
  - (d) The S.G. Foods complainants stress their belief that the task force report is trustworthy (S.G. Foods complainants' memorandum contra at 20-22).

- (63) On October 29, 2004, the S.G. Foods respondents filed a reply memorandum (S.G. Foods respondents' reply), attempting to rebut the S.G. Foods complainants' arguments on four points:
- (e) The S.G. Foods respondents contend that, while case law does state that the Commission is not strictly bound by the rules of evidence, it does routinely apply those rules (S.G. Foods respondents' reply at 4-6).
  - (f) According to the S.G. Foods respondents, there is no solid legal authority establishing the task force as a public office or agency under both Canadian and U.S. law. Rather, S.G. Foods respondents contend that a task force can not "be considered a public agency when it includes private individuals and relies on the work of nongovernmental entities" (S.G. Foods respondents' reply at 7-12).
  - (g) The S.G. Foods respondents reason that the task force report is an evaluative report and is therefore not admissible under Rule 803(8)(b), ORE (S.G. Foods respondents' reply at 12-18).
  - (h) Finally, the S.G. Foods respondents argue, again, that the task force report lacks indicia of trustworthiness and reliability (S.G. Foods respondents' reply at 18-24).
- (64) As noted by both the S.G. Foods complainants and the S.G. Foods respondents, the Commission is not strictly bound by rules of evidence. *Greater Cleveland Welfare Rights Org., Inc. v. Pub. Util. Comm.*, 2 Ohio St.3d 62 (1982). The respondents argue that, in fact, the Commission does follow rules of evidence with regard to hearsay. However, this is not always the case. When the Commission has deemed it appropriate, it has allowed the admission of hearsay testimony. For example, in the hearing on *In the Matter of the Complaint of WorldCom, Inc., et al. v. City of Toledo*, Case No. 02-3207-AU-PWC, *et al.*, hearsay testimony by representatives of the city of Toledo was admitted, over objection by other parties. Clearly, the Commission does not always follow the rules of evidence strictly. However, we do find the rules of evidence to be instructive and, therefore, appropriate for consideration.

- (65) In order to rule that the task force report is admissible under Rule 803(8), ORE, as an exception to the hearsay exclusion, quoted above, we must find (a) that the task force itself is a "public office or agency," as that term is used in the rule, (b) that the task force report fits under one of the rule's subsections, and (c) that other information or circumstances do not indicate a lack of trustworthiness.
- (66) According to the task force report, the task force was assembled under the direction of President George Bush of the United States and Prime Minister Jean Chrétien of Canada. Its report was submitted to the president and the prime minister by the U.S. Secretary of Energy and the Canadian Minister of Natural Resources. While testimony and data of various types may have been received from sources outside of any branch of government, a review of the members of the task force and its working groups shows that almost every listed member is a governmental employee. Those members include representatives of the office of the President; the department of homeland security; the department of energy; the federal energy regulatory commission; the nuclear regulatory commission; the federal bureau of investigation; various states' utilities commissions, environmental departments, security offices, and information technology departments; and similar organizations on the Canadian side. Task Force Report at 1 and at Appendix A.
- (67) Little case law exists regarding the issue of whether an ad hoc committee established for a particular purpose is a "public office or agency." The most helpful judicial discussion of the issue is found in *Wetherill v. University of Chicago*, 518 F. Supp. 1387 (N. Dist. Ill. 1981), where the parties debated the admissibility of the report of an ad hoc task force established by the United States Department of Health, Education and Welfare. The task force in that case was comprised of a group of doctors and experts employed with various departments of the federal government. "In addition to the task force members themselves, a large group of consultants participated actively in preparing the Report. That consultant group consisted of both doctors and non-professionals, several of whom were active in organized efforts to expose the allegedly harmful effects of [a chemical]." *Wetherill* at 1388. The court found the report not to be admissible on other grounds but did discuss the question of



whether this group fell within the parameters of the rule. "Because other requirements of the Rule are not satisfied . . . this Court does not deal with the question whether the Report was the product of a 'public office or agency' within the Rule's meaning or purpose. Under the circumstances of the Report's compilation and in view of the input from nongovernmental sources, that issue is also open to some doubt." *Wetherill* at 1389.

- (68) Applying the *Wetherill* court's concerns to the task force report relating to the blackout yields different results. As discussed above, the members of the task force and its working groups are almost entirely government employees. Although the task force received comments from numerous members of the public, the task force report appears to have been written by the task force members, not by outside consultants. (Task Force Report at Appendix B.) Therefore, the concerns expressed by the *Wetherill* court do not appear to be applicable. The fact that it is an ad hoc group, comprised of members of many state, federal and Canadian governmental entities and including some members from outside of government, does not change its essential characteristic as a governmental organization. The task force, based on its composition and establishment, does not appear to have any motive for conducting the studies other than to inform the public fairly and adequately. In light of the structure of the task force, the manner of its creation, and its mode of operation, as described in the task force report and the memoranda filed by the parties, the Commission finds that the task force falls within the rule's requirement that a document be the work of a "public office or agency."
- (69) Our second step is to determine whether the task force report falls under either of the two categories recognized as exceptions to the hearsay rule by Ohio's Rule 803(8), ORE. The first category allows the admission of reports of the "activities" of an office or agency. The task force report is clearly more than a simple recitation of the activities of the task force and, therefore, is not admissible under subsection (a) of the rule.
- (70) Subsection (b) is broader in scope than subsection (a), allowing the admission of "matters observed pursuant to duty imposed by law as to which matters there was a duty to report . . ." However, courts in Ohio have held that "evaluative and inves-

“investigative” reports are not admissible under subsection (b). *Pool v. Wade*, 115 Ohio App. 3d 449 (Lucas Cty. 1996); *State of Ohio v. Humphries*, 79 Ohio App. 3d 589 (Clermont Cty. 1992); *Cincinnati Insurance Company v. Volkswagen of America, Inc.*, 41 Ohio App. 3d 239 (Franklin Cty. 1987). Although such reports might be admissible under subsection (c) in federal courts and in other state jurisdictions, that subsection was intentionally omitted from the rules of evidence adopted in Ohio. Rule 803(8), ORE (staff notes). The Commission, in reviewing the task force report, finds that it covers substantially more than just factual information. In addition, the task force report includes numerous conclusions about causation of the blackout. Thus, the Commission finds that the task force report is an “evaluative and investigative” report and is therefore not admissible under subsection (b) of Rule 803(8), ORE, as an exception to the exclusion of hearsay.

- (71) In summary, the Commission is presented, as described above, with the question of whether to admit the task force report as an exception to the exclusion of hearsay. The Commission finds that, in this circumstance, it is appropriate to rely on the Ohio rules of evidence. Therefore, the Commission will not allow admission of the task force report as a hearsay exception. The Commission is not making a determination as to whether there may be other circumstances under which the task force report might be admissible.
- (72) The S.G. Foods respondents also moved for a ruling that expert testimony on the basis of the task force report be prohibited. As the Commission has no information as to what testimony might be presented or how the task force report might be used, we find that it is premature to rule on this motion. The Commission would, however, direct the attorney examiner assigned to these proceedings to establish a procedural schedule that will allow time for a review of any expert testimony with regard to this issue prior to the hearing on the matter.

#### Respondents' Motions to Dismiss

- (73) On September 6, 2005, the Triple A respondents filed a motion to dismiss the Triple A complaint on the bases that ATSI has no contractual relationship with Consolidated Edison (who allegedly failed to transmit power to the complainant) and that a

non-customer complainant cannot bring a claim predicated on a public utility's alleged failure to serve its customers. As we discussed above, complaints by persons who are not Ohio customers or consumers will be dismissed on jurisdictional grounds. However, we have allowed a period for amendment of the various consolidated complaints in order to correct this jurisdictional deficiency. If the Triple A complaint is not so amended, then the motion to dismiss will be granted.

- (74) On January 13, 2006, the respondents in the Allianz, Lexington, and Triple A cases filed motions to dismiss those complaints. Although each of such motions is specific to each case, the arguments are similar. Therefore, the Commission will discuss them as a group, where possible.
- (75) In the motions to dismiss the Lexington and Allianz cases, the respondents argue that a subrogation claim may not be brought before the Commission. The issue of subrogation and proper pleading procedure was previously discussed. The motions to dismiss on this ground will not be determined, pending the possible amendment of the complaints.
- (76) In the motions to dismiss the Lexington and BMW cases, the respondents argue that claims may not be filed by noncustomers. This issue was also discussed above. The motions to dismiss on this ground will not be determined, pending the possible amendment of the complaints.
- (77) In the motion to dismiss the BMW complaint, the respondents argue that the complaint by unidentified complainants must be dismissed. We have previously stated that amendment of the complaint will be allowed. The motion to dismiss on this ground will not be determined, pending the possible amendment of the complaint.
- (78) In the motions to dismiss the Lexington, Allianz, and BMW complaints, the respondents suggest that the complaints be dismissed as failing to state reasonable grounds for relief. They assert, *inter alia*, that there is no violation of the Section 4933.81 or 4933.83, Revised Code, requirement for the provision of adequate facilities; there can be no showing of inadequate service on the basis of one outage; there are insufficient allegations of specific facts that would constitute inadequate service; and the complaints seek relief that is contrary to public policy. The

Commission finds that the resolution of these issues requires the development of an evidentiary record. The motions to dismiss on these bases will be denied.

It is, therefore,

ORDERED, That the S.G. Foods complaint against FirstEnergy Corp. be dismissed. It is, further,

ORDERED, That the motion by ATSI, OE, and CEI for an order precluding the admission of the task force report into evidence at the hearing in these proceedings, as a hearsay exception, under Rule 803(8), ORE, be granted. It is, further,

ORDERED, That the motion, in the S.G. Foods case, by ATSI, OE, and CEI for an order precluding expert testimony based on the task force report be deferred for future consideration. It is, further,

ORDERED, That the Miles complaint against FirstEnergy Corp. be dismissed. It is, further,

ORDERED, That the Miles complaint should be amended to clarify the identification of the complainants and the nature of their complaints, as discussed in this entry. It is, further,

ORDERED, That the Allianz complaint be amended to name, as complainants, the insured entities who are real parties in interest, as discussed in this entry. It is, further,

ORDERED, That the Allianz complaint against Metropolitan Edison Company, Jersey Central Power and Light Company and the Pennsylvania Electric Company be dismissed, pursuant to the Allianz complainants' notice of voluntary dismissal of such entities. It is, further,

ORDERED, That the Allianz complaint against FirstEnergy Corp. be dismissed. It is, further,

ORDERED, That the Allianz respondents' motion to dismiss the complaint against all other respondents be denied in part and deferred in part. It is, further,

ORDERED, That the Lexington complaint be amended to name, as complainants, the insured entities who are real parties in interest, as discussed in this entry. It is, further,

ORDERED, That the Lexington complaint against Metropolitan Edison Company, Jersey Central Power and Light Company and the Pennsylvania Electric Company be dis-

missed, pursuant to the Lexington complainants' notice of voluntary dismissal of such entities. It is, further,

ORDERED, That the Lexington complaint against FirstEnergy Corp. be dismissed. It is, further,

ORDERED, That the Lexington respondents' motion to dismiss the complaint against all other respondents be denied in part and deferred in part. It is, further,

ORDERED, That the BMW complaint should be amended to clarify the identification of the complainants and the nature of their complaints, as discussed in this entry. It is, further,

ORDERED, That the motion by the BMW complainants to dismiss the complaint against AEP, MISO, and PJM be granted. It is, further,

ORDERED, That the BMW complaint against FirstEnergy Corp., Pennsylvania Power Company, and one hundred unnamed respondents be dismissed. It is, further,

ORDERED, That the BMW respondents' motion to dismiss the complaint against the remainder of the respondents be denied in part and deferred in part. It is, further,

ORDERED, That the Triple A complaint against FirstEnergy Corp. be dismissed. It is, further,

ORDERED, That the Triple A complaint should be amended to clarify the identification of the complainant and the nature of the complaint, as discussed in this entry. It is, further,

ORDERED, That determination of the Triple A respondents' motion to dismiss the complaint against the remainder of the respondents be postponed pending possible amendment of the Triple A complaint. It is, further,


ORDERED, That the Kucinich complaint should be amended to clarify the identification of the complainant and the nature of his complaint, as discussed in this entry. It is, further,

ORDERED, That the Kucinich complaint against FirstEnergy Corp. be dismissed. It is, further,

ORDERED, That the purported complaint by Coalition and Consumers be dismissed. It is, further,

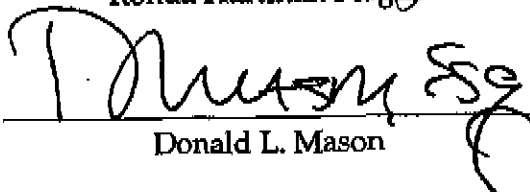
ORDERED, That a copy of this entry be served upon all parties of record.

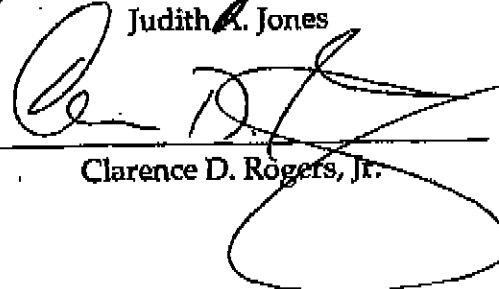
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
ABSTAIN  
Alan R. Schriber, Chaitman

  
Ronda Hartman Fergus

  
Judith A. Jones

  
Donald L. Mason

  
Clarence D. Rogers, Jr.

JWK;geb

Entered in the Journal

MAR 07 2008



Renee J. Jenkins  
Secretary

## BEFORE

## THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of	)	
Curtis and Phillis Petersen, by State Farm	)	
Fire & Casualty Company as subrogee,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 03-0832-EL-CSS
	)	
The Cleveland Electric Illuminating	)	
Company,	)	
	)	
Respondent.	)	

ENTRY

The Attorney Examiner, pursuant to the authority granted by Rule 4901-1-14, Ohio Administrative Code (O.A.C.), finds:

- (1) On March 27, 2003, State Farm Fire & Casualty Company, as subrogee of Curtis and Phillis Petersen (State Farm), filed a complaint against The Cleveland Electric Illuminating Company (CEI) requesting a monetary judgment for damages to the Petersen's real and personal property resulting from alleged negligence in failing to properly inspect and maintain the electric meter and socket at the Petersen's residence. On April 16, 2003, by fax, and on April 17, 2003, by filing original documents, CEI filed an answer and a motion to dismiss this case.
- (2) A prehearing settlement conference was conducted on Wednesday, June 4, 2003, at the offices of the Commission, in accordance with an attorney examiner entry issued May 14, 2003. The parties, however, were not able to resolve the issues raised by this case. Also during the settlement conference, the parties advised the settlement attorney examiner of a pending proceeding in the 11<sup>th</sup> District Court of Appeals (11<sup>th</sup> District) concerning whether this Commission has jurisdiction over this particular matter. Due to the schedule in the 11<sup>th</sup> District case, the parties agreed on the following preliminary schedule for this proceeding:

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business technician \_\_\_\_\_ Date Processed 12-29-04

EXHIBIT

D

July 8, 2003	Amended Complaint
August 8, 2003	Response to Amended Complaint
August 14, 2003	Telephone status conference

- (3) On June 10, 2003, an attorney examiner entry was issued that confirmed the above preliminary schedule and stated the following directives with respect to the amended complaint:

Complainant in this matter is State Farm Fire & Casualty Company, as subrogee for Curtis and Phillis Petersen, the electric consumers. Due to the unusual nature of the complainant in this matter, the Attorney Examiner requested that complainant either, add Curtis and Phillis Petersen, as additional complainants, to an amended complaint; or to provide a notarized affidavit from each of the Petersens acknowledging that State Farm is representing their interests as electric consumers in this matter, as part of an amended complaint. The Attorney Examiner also requested that Complainant state, in its amended complaint, the specific sections of the Ohio Revised Code or Ohio Administrative Code, pursuant to utilities, that CEI is alleged to have violated in this matter.

- (4) On July 8, 2003, State Farm filed an amended complaint titled "Complainant's First Amended Complaint. On August 8, 2003, CEI filed its answer to the "First Amended Complaint" and noted that State Farm's pleading did not add Curtis and Phillis Petersen as additional complainants to the amended complaint or provide a notarized affidavit from each of the Petersens, as requested. CEI also renewed its outstanding motion to dismiss this case.
- (5) On August 14, 2003, a case status conference was conducted by telephone, in accordance with the June 10, 2003 attorney examiner entry. During that status conference, the parties informed the settlement attorney examiner that briefs were filed in the 11<sup>th</sup> District Court of Appeals case; however, the balance of that case schedule had not been determined at that time. Accordingly, the settlement attorney examiner requested that the parties inform the attorney examiner of the 11<sup>th</sup> District Court's decision regarding whether the



Commission has jurisdiction over this particular matter, rather than the Lake County Court of Common Pleas. On July 8, 2004, counsel for CEI submitted an electronic copy of the 11<sup>th</sup> District Court's decision that the Commission has jurisdiction over the issues in this proceeding. *State Farm Fire & Casualty Company v. Cleveland Electric Illuminating Company*, 2004 Ohio 3506; Case No. 2003-L-032 (June 30, 2004).

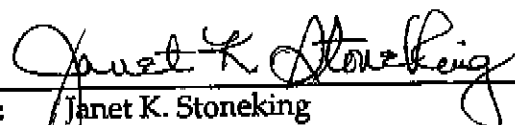
- (6) Commission records indicate no activity in this docket since August 11, 2003.
- (7) In view of the fact that this case has been inactive for several years, the attorney examiner requests that State Farm call her by January 15, 2007, to discuss the best method to move forward with the prosecution of this matter. The attorney examiner can be reached at 614-466-6849. Should State Farm fail to contact the Commission, the attorney examiner will recommend that the Commission dismiss this case and close it of record for lack of prosecution.

It is, therefore,

ORDERED, That State Farm call the Commission, in accordance with finding (7). It is, further,

ORDERED, That a copy of this entry be served on all parties of record.


THE PUBLIC UTILITIES COMMISSION OF OHIO

  
 By: Janet K. Stoneking  
 Attorney Examiner

/ct 

Entered in the Journal

DEC 29 2006

  
 Renee J. Jenkins  
 Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Miami Wabash Paper LLC, )  
 )  
 Complainant, )  
 )  
 v. ) Case No. 02-2162-EL-CSS.  
 )  
 The Cincinnati Gas & Electric Company, )  
 )  
 Respondent. )

In the Matter of Miami Wabash Paper LLC, )  
 )  
 Complainant, )  
 )  
 v. ) Case No. 01-3135-EL-CSS  
 )  
 The Cincinnati Gas & Electric Company, )  
 )  
 Respondent. )

OPINION AND ORDER

The Commission, considering the complaint, the evidence of record, the arguments of the parties, and the applicable law, and being otherwise fully advised, hereby issues its Opinion and Order.

APPEARANCES:

Chester, Wilcox and Saxbe LLP, by John W. Bentine and Bobby Singh, 65 East State Street, Suite 1000, Columbus, Ohio 43215, on behalf of Miami Wabash Paper LLC.

Michael J. Pahutski and John J. Finnigan, 139 East Fourth Street, P.O. Box 960, Cincinnati, Ohio 45201-0960, on behalf of The Cincinnati Gas & Electric Company.

OPINION:

I. Background

5 / Miami Wabash Paper LLC (Miami Wabash) is an Ohio limited liability corporation, located in Franklin, Ohio, which manufactures coated paper product by starting with rolls

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EXHIBIT

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of uncoated paper and paperboard, applying a coating and then either rewinding the materials or cutting them into sheets of finished product (Complaint (as defined below), at para. 3; December 10, 2002, transcript [hereinafter Tr. I] at 61-62). The Cincinnati Gas & Electric Company (CG&E) is an electric light company, as defined in Section 4905.03(A)(4), Revised Code, and is a public utility as defined by Section 4905.02, Revised Code. During the period from January 1, 1999, through the filing of the complaint in this case, CG&E was the monopoly provider of either integrated electric services or electric distribution and transmission services to Miami Wabash (Complaint at para. 1).

On December 4, 2001, Miami Wabash filed a complaint against CG&E,<sup>1</sup> alleging that CG&E had failed to deliver adequate service to Miami Wabash, had failed to design, investigate and fix certain service problems, and had engaged in inadequate and deceptive business practices. On August 21, 2001, after the filing of an answer by CG&E and various pleadings, the holding of conferences at Commission offices and the pursuit of discovery, Miami Wabash filed a notice of voluntary dismissal, without prejudice.

On August 22, 2002, Miami Wabash commenced the present proceeding by filing a new complaint (complaint) against CG&E, making similar allegations as those made in the first case. Specifically, Miami Wabash alleges, among other things, that (a) the electric service which Miami Wabash receives from CG&E has been legally inadequate from January 1, 1999, through August 22, 2002, in violation of Section 4905.26, Revised Code, and CG&E's tariff obligations, due to approximately forty service outages and voltage sags; (b) the electric service from CG&E is inadequate, and CG&E's business practices are unlawful, as a result of its poor design of distribution facilities and its failure to identify and fix problems with facilities that serve Miami Wabash; (c) CG&E has failed to investigate service problems on a timely basis, has provided confusing and misleading explanations of service problems and has attempted to divert attention away from problems, which attempts are inadequate and deceptive business practices and are unreasonable and unlawful; and (d) the inclusion of changeable service regulations in CG&E's tariffs constitutes inadequate and deceptive business practices that are unreasonable and unlawful.

CG&E filed its answer on September 9, 2002, admitting that electrical service to Miami Wabash has been subject to several voltage sags and interruptions, but specifically denying, among other things, that (a) it makes any guarantee of a constant and uninterrupted supply of electricity; (b) it has provided legally inadequate electric service to Miami Wabash; (c) it has failed to identify the causes of outages or to attempt to repair problems; and (d) it has engaged in inadequate and deceptive business practices. In addition, CG&E contends, among other things, that (a) the complaint fails to state a claim upon which relief may be based; (b) Miami Wabash was itself negligent and failed to

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<sup>1</sup> *In the Matter of Miami Wabash Paper LLC v. The Cincinnati Gas & Electric Company*, Case No. 01-3135-EL-CSS.

mitigate its damages; and (c) it complied with its electric tariff on file with the Commission.

CG&E filed a motion on September 16, 2002, to dismiss this case with prejudice or to reimpose the discovery cut-off date, due to dismissal of the previous complaint and filing of this, substantially identical, case one day later. Miami Wabash filed its memorandum contra that motion on September 30, 2002, and CG&E filed a reply to the memorandum contra on October 10, 2002. The motion was not granted.

On December 4, 2002, prior to the hearing date, the parties filed a stipulation as to the date, time and duration of outages affecting Miami Wabash, and as to the scope of the hearing. With regard to the scope, the parties agreed that the hearing would be limited to the first count of the complaint, being whether or not the outages experienced by Miami Wabash from January 1, 1999, until the filing of the amended complaint<sup>2</sup> render CG&E's service inadequate under Ohio law. Additionally, Miami Wabash agreed (a) to withdraw all other counts of the complaint, retaining only count one; (b) to narrow count one of the complaint to only the issue of outages and not voltage reductions; and to withdraw all prayers for relief in the complaint other than item number (iv). Thus, the remaining issue in the case is only whether outages occurring between January 1, 1999, and August 22, 2002, render CG&E's service inadequate under Ohio law.<sup>3</sup> Miami Wabash asks the Commission to find that CG&E has rendered inadequate and discriminatory service to Miami Wabash, and violated Ohio statutes and administrative rules, during the period January 1, 1999, until August 22, 2002.<sup>4</sup>

The public hearing was held on December 10 and 11, 2002, at the Commission offices. Miami Wabash presented the testimony of Robert Kaminski and Thomas D. Crockett. CG&E witnesses included Larry E. Conrad, David C. Ward, Kenneth S. Sedziol, and John C. Procario. Post hearing briefs were filed by Miami Wabash and CG&E on January 24, 2003 (Miami Wabash brief and CG&E brief, respectively), and post hearing reply briefs were filed by Miami Wabash and CG&E on February 14, 2003 (Miami Wabash reply brief and CG&E reply brief, respectively).

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<sup>2</sup> No amended complaint was filed in this matter. Hence, it will be assumed that this reference refers to the complaint in this matter and was intended to distinguish that complaint from the complaint filed in the earlier action between these parties.

<sup>3</sup> That this is the sole issue at the hearing was confirmed by both parties on brief (Miami Wabash brief at 4-5; CG&E brief at 1).

<sup>4</sup> August 22, 2002, is the date on which the complaint in this action was filed. Miami Wabash has also declared that its outages essentially ceased after that date, due to a number of repairs and alterations to the system having been made. (Tr. I at 68-69; Miami Wabash brief at 10, 31; Miami Wabash reply brief at 2, 16, 20.)

## II. The Law

Section 4905.22, Revised Code, provides that "[e]very public utility shall furnish necessary adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable." Section 4905.26, Revised Code, provides in relevant part that, "[u]pon complaint in writing against any public utility by any . . . corporation, . . . that any service is, or will be, inadequate or cannot be obtained, . . . if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing . . ."

Rule 4901:1-10-10, Ohio Administrative Code (O.A.C.), provides for electric distribution companies to submit to the Commission system performance reliability targets, with system performance to be measured in a variety of ways, as well as periodic data showing whether or not those targets are met. When a company meets performance standards, "a rebuttable presumption is created that the electric utility is providing adequate service regarding that standard." Rule 4901:1-10-01(F), O.A.C.<sup>5</sup> Rule 4901:1-10-11, O.A.C., requires distribution companies to submit a method for determining the performance of each distribution circuit, and periodic data showing the worst circuits' performance based on that method. Circuit performance that is free of outages is not required.

Rule 4901:1-10-27, O.A.C., sets up a system for the assessment of transmission circuit reliability, requiring the filing of an assessment method as well as periodic reports on the actual performance of individual transmission circuits. Once again, there is no requirement that performance be free of outages.

Both distribution and transmission systems are also required to be inspected, maintained, repaired and replaced on a regular basis. Rule 4901:1-10-27, O.A.C. This rule requires the inspection of all "electric transmission and distribution facilities (circuits and equipment) to maintain safe and reliable service" at least one time every five years, for distribution circuits and equipment, and at least once each year for transmission circuits and equipment. It also requires that each utility establish and maintain programs, procedures and schedules for the inspection, maintenance, repair and replacement of transmission and distribution circuits and equipment. "These programs shall establish preventative requirements for the electric utility to maintain safe and reliable service."

The final level of controlling authority as to adequate service is CG&E's tariff. That tariff provides as follows:

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<sup>5</sup> This is the designation of this rule as of the date of this opinion and order. However, the Commission notes that the numbering of this rule is changing in the near future, as new rules have been adopted.

The Company will make reasonable provisions to supply satisfactory and continuous electric service, but does not guarantee a constant or uninterrupted supply of electricity and shall not be liable for any damage or claim of damage attributable to any interrupting or reversal of service caused by accident or casualty, extraordinary action of the elements, action of any governmental authority, litigation, deficiency of supply, or by any cause which the Company could not have reasonably foreseen and made provision against.

CG&E's Tariff, P.U.C.O. Electric No. 19, Sheet No. 21, Section II - Supply and Taking of Service.

It should, finally, be noted that in complaint cases before the Commission, the complainant has the burden of proving its case. *Grossman v. Public Utilities Commission*, 5 Ohio St.2d 189, 190, 214 N.E.2d 666, 667 (1966). Thus, in order to prevail, Miami Wabash must prove, by a preponderance of the evidence, that the electric service it received from CG&E during the period in question was inadequate under Ohio law.

### III. Discussion and Conclusions

#### A. Administrative Rule Providing Presumption of Adequacy

Ohio law requires that all public utilities provide "adequate service," as quoted above. Rule 4901:1-10-01(F), O.A.C., provides that, if an electric distribution utility shows that it has complied with the "relevant service or performance standard," then "a rebuttable presumption is created that the electric utility is providing adequate service regarding that standard." Pursuant to Commission rules, CG&E has calculated performance targets for its electrical service, measured by several indices. SAIFI, or the system average interruption frequency index, records certain outages experienced on a company's system. CG&E's SAIFI target is 1.50 outages per year. It is a way of evaluating the system as a whole, as opposed to individual circuits. (Tr. I at 178-180; Ex. LEC-3 to CG&E Ex. 1.) The ASAI, CAIDI, SAIDI, and MAIFI indices, measuring availability of service, hours per outage, hours out per year, and momentary outages respectively, were not discussed in any detail by the parties (see, however, CG&E Ex. 4, at 5). However, the Commission would note that they are, like SAIFI, measurements on a system-wide basis.

CG&E argues that, because the issue in the case relates to whether the number of outages constitutes inadequate service, SAIFI is the appropriate standard. It further argues that, as it has met its SAIFI target for each of the years covered by this complaint, it has the benefit of a rebuttable presumption of adequacy. (CG&E brief at 9-10.)

Miami Wabash disputes this contention. It urges the Commission to consider the fact that the SAIFI target "applies only to *system performance at large*. This proceeding is

not about the adequacy of CG&E's *system* in general, but is about the inadequacy of CG&E's service to Miami Wabash . . ." Miami Wabash also argues that the presumption does not apply to requirements concerning inspection, maintenance, repair, and replacement issues and that, when calculated according to provisions of the rules, CG&E did not actually meet the SAIFI standards. (Miami Wabash reply brief at 7-14.)

The Commission agrees with Miami Wabash with regard to whether SAIFI is the relevant standard. This index measures how a company's entire system is performing. On the other hand, this case relates to service to one particular customer. Therefore, SAIFI data is irrelevant to the question of whether CG&E's service to Miami Wabash was adequate during the relevant period.

Likewise, although Rule 4901:1-10-01(F), O.A.C., would give an electric distribution utility a rebuttable presumption that its service was adequate in a proceeding that was considering the adequacy of the service of the system, the rule specifically states that the rebuttable presumption is created only when a company demonstrates compliance with a "relevant" standard. A system-wide average is not specifically relevant to the quality of service received by an individual customer. Since the Commission finds that SAIFI is not the "relevant" performance standard, no rebuttable presumption arises. Therefore, the questions of its application to inspection, maintenance, repair, and replacement issues and its proper calculation are moot.

## B. Requirement for Provision of Adequate Service

### 1. Definition of "Adequate Service"

Although Ohio law requires that all public utilities provide "adequate service," that term is never defined, either by statute or by administrative rule. "Inadequate service" is not defined in R.C. Title 49, that determination being left to the commission and dependent upon the facts of each case." *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 14 Ohio St.3d 49, 50, 471 N.E.2d 475, 477 (1984). A pivotal question in the present case is, therefore, how to determine the adequacy of the service provided.

CG&E witnesses testified that it evaluates its own service by reference to the term "good utility practices." Mr. Larry E. Conrad, Manager, Operations Engineering for Cinergy Services, Inc., a service company authorized by the Securities and Exchange Commission to provide services to and on behalf of CG&E, testified that "[g]ood utility practice is a state where an electric utility is designing and operating its distribution system to achieve safe, reliable and cost effective electric supply using configurations, equipment, and maintenance practices consistent with national standards, regulatory requirements, and methods generally accepted by other utilities and industry experts." (CG&E Ex. 1, at 1, 5.) Mr. David C. Ward, Manager, Transmission and Distribution Construction and Maintenance for CG&E, confirmed this definition (CG&E Ex. 2, at 1, 5).

Miami Wabash seeks to define adequate service by reference to CG&E's tariff language. In its post-hearing brief, Miami Wabash quotes CG&E's tariff, stressing that the tariff requires CG&E to take actions to guard against damages from causes that it could reasonably foresee and could reasonably make provisions against. Miami Wabash concludes that the service was inadequate on the basis of (1) the sheer number of outages, (2) the failure of CG&E to appropriately investigate the causes of outages, and maintain and repair its facilities, and (3) the failure of CG&E to appropriately design and operate its facilities. (Miami Wabash brief at 6, 8.)

The Commission has previously addressed the issue of the adequacy of electrical service in the context of numerous outages. Noting that an electric company must provide reliable service but does not guarantee the absence of outages and momentary interruptions, the Commission has found that "[t]he first question to consider in this case is whether the cause of the problems is in the control of the Company. Did the company act responsibly to prevent electrical problems before they occurred and did they respond properly after reviewing the system as it relates to the complainants?" *In the Matter of the Complaint of Mary E. Cogswell, et al. v. The Toledo Edison Company*, Case No. 91-1421-EL-CSS (Opinion and Order, July 22, 1993, at 4). The Commission was even more specific in another electric complaint case:

It is clear that the fact that there are outages or a number of outages does not constitute inadequate service. [The Company] does not guarantee the deliverance of electricity continuously and without interruption but only that it will endeavor to do so . . . . The first question to consider is whether the cause of the outage was in the control of the Company. This question goes beyond whether the cause of the outage was natural or weather related. After all, if the Company is aware that lightning and animals cause outages, then what the Company has done to reduce the number, duration, and area affected by these outages is of concern. *Did [the Company] act responsibly to prevent outages before they occurred and did they respond properly after an outage occurred?*

*In the Matter of Steve Martin v. The Dayton Power & Light Company*, Case No. 91-618-EL-CSS (Opinion and Order, September 10, 1992, at 7) (emphasis added).

In the Commission's analysis of the facts in the present case, it is certainly helpful to know that CG&E's design and operation, construction and maintenance activities with regard to both its distribution and its transmission facilities comply with national standards and applicable regulations and are consistent with methods used by other utilities. (CG&E Ex. 1, at 5-6, 8-10, 13-14; CG&E Ex. 2, at 5-7, 9-12, 14). However, this assurance from CG&E is not sufficient to allow the Commission to conclude that its services to Miami Wabash were adequate. Rather, the Commission must determine whether the outages were within



CG&E's control. Such control can be a function of the nature and number of the outages themselves, or can be found in its actions to prevent such outages (that is, its design, operation, and maintenance of its system). The Commission must also determine whether its responses after the outages occurred (that is, the repair of its systems) were reasonable and adequate. This opinion and order will therefore first consider the nature and number of the outages, and will then proceed to review CG&E's design and operation, its maintenance programs and its responses to the outages.

## 2. Nature and Number of Outages

Before starting to evaluate the outages themselves, a general understanding of the distribution and transmission systems serving Miami Wabash is critical. Miami Wabash was served, during most of the relevant period, by a distribution circuit designated Franklin 43 (CG&E Ex. 1, at 6; Tr. I at 135, 146). Franklin 43 is a radial system comprised of about 14 miles of bare conductors on crossarms, supported by insulators, and generally serves 370 customers (CG&E Ex. 1 at 6; Tr. I at 138, 163).<sup>6</sup> The Franklin 43 distribution circuit is tied, for emergency situations, to various other distribution lines, including one denominated Carlisle 42 (December 11, 2002, transcript [hereinafter Tr. II] at 28). The power to Franklin 43 was supplied primarily by transmission circuit 5665, a 69,000 volt circuit or, near the end of the period, by transmission circuit 3766, another 69,000 volt circuit (CG&E Ex. 1 at 6-7; Tr. I at 154-155, 158-159).

The parties stipulated as to the number of outages that occurred during the relevant 43-1/2-month time period, as well as their time and duration (Joint Ex. 1, Attachment A). On the Franklin 43 circuit, 36 outages occurred. For convenience purposes, the following listing will show not only the stipulated dates, times and durations, but also CG&E's conclusion as to the cause of each outage.

Date	Time	Duration	Cause <sup>7</sup>
January 2, 1999	18:10	1 second	Defective capacitor
January 19, 1999	16:04	1 second	Unknown
February 7, 1999	13:28	54 minutes	Wind
May 17, 1999	10:05	1 second	Animal
June 11, 1999	0:25	6 hours, 19 min	Cable fault, level 3 storm <sup>8</sup>

<sup>6</sup> Mr. Conrad noted that occasionally the circuit has served as many as 712 customers, in abnormal circumstances (CG&E Ex. 1, at 6; Tr. I at 163).

<sup>7</sup> The causes shown in this and the following three similar tables are from Exhibit DCW-1 to CG&E Ex. 2.

<sup>8</sup> The designation of the level of storms is not related to the severity of the storm but, rather, to the number of customers affected by the resultant outage(s). Level 1 refers to storms during which "a few thousand, maybe 10,000 customers" are interrupted. A level 2 storm is one with "several tens of thousands of customers out due to more widespread weather." A level 3 storm is one with "maybe 100,000 customers out." Level 4 refers to a storm requiring "mutual assistance from other utilities as well with longer outage durations." (Tr. I at 176-177.)

Date	Time	Duration	Cause
June 12, 1999	15:03	1 minute	Level 3 storm # 9 (heat & thunderstorms)
June 27, 1999	2:17	1 second	Kite in line upon inspection
June 27, 1999	22:13	1 second	Kite in line upon inspection
October 13, 1999	11:30	2 hours, 32 min	Level 3 storm
March 13, 2000	15:06	20 seconds	Toy rocket in line upon inspection
March 14, 2000	15:44	58 minutes	Vandalism-insulators shot off
June 16, 2000	19:41	1 second	Level 2 storm # 7
September 2, 2000	18:41	51 minutes	Lightning
October 15, 2000	10:40	20 seconds	Unknown
June 12, 2001	8:31	1 second	Level 3 storm (lightning)
July 3, 2001	8:34	1 hour, 12 min	Switch failure
August 4, 2001	13:02	1 second	Vandalized & contaminated insulators upon inspection
September 7, 2001	16:26	1 second	Vandalized & contaminated insulators
September 20, 2001	15:37	1 second	Vandalized & contaminated insulators upon inspection
September 28, 2001	11:59	1 hour, 10 min	Cable failure
October 4, 2001	12:42	20 seconds	Vandalized & contaminated insulators upon inspection
October 24, 2001	20:25	7 minutes	Level 3 storm (lightning)
October 25, 2001	11:45	1 second	Level 3 storm (wind)
October 25, 2001	14:59	57 minutes	Level 3 storm (wind)
October 25, 2001	17:22	1 second	Level 3 storm (wind)
October 25, 2001	18:53	30 minutes	Level 3 storm (wind)
April 28, 2002	12:46	20 seconds	Level 2 storm #9 -possibly wind
April 28, 2002	13:09	1 second	Level 2 storm #9 -possibly wind
April 28, 2002	14:43	1 second	Level 2 storm #9 -possibly wind
April 28, 2002	16:53	1 second	Level 2 storm #9 -possibly wind
May 25, 2002	20:02	56 minutes	Insulator failed possibly due to lightning (during level 1 storm #11)
May 25, 2002	22:33	2 minutes	Reopened to strap disconnect switch
May 25, 2002	22:53	11 minutes	Feeder tripped while attempting to restore remainder of circuit - led to discovery of insulator likely causing first outage
June 26, 2002	18:04	20 seconds	Level 2 storm #16 - possibly lightning

Date	Time	Duration	Cause
July 29, 2002	18:25	1 hour, 55 min	Level 3 storm #20 (lightning) - static in primary
August 1, 2002	9:59	1 second	Unknown

On the Carlisle 42 distribution circuit, there was one outage during this period:

Date	Time	Duration	Cause
March 9, 2002	14:46	2 hours, 57 min	Level 3 storm #2 (wind)

The primary transmission circuit serving Miami Wabash during most of this period, number 5665, had the following nine stipulated outages:

Date	Time	Duration	Cause
September 29, 1999	12:16	1 second	Lightning
March 11, 2000	15:06	8 minutes	Galloping conductors - ice & wind
June 27, 2000	20:35	13 minutes	Jumper burnt off
August 3, 2000	2:21	8 seconds	Lightning
February 15, 2001	0:41	2 seconds	Recloser damage at Red Lion substation
May 16, 2001	0:17	22 minutes	Storm
July 27, 2001	15:41	56 minutes	Auto accident
July 31, 2001	15:40	3 minutes	Unknown
August 11, 2001	19:16	8 seconds	Lightning

Finally, the transmission circuit to which Miami Wabash was moved near the end of the relevant period, number 3766, had two stipulated outages:

Date	Time	Duration	Cause
July 19, 2002	16:51	8 seconds	Level 1 storm #18 (lightning)
July 27, 2002	3:17	8 seconds	Lightning

These lists show a total of 48 outages that affected Miami Wabash in a 43-1/2-month time period. Of these, five were a result of equipment failure (not related to other factors), 29 were related to severe weather, four were apparently caused by contamination of the lines by airborne tar from an asphalt roofing plant, five were attributed to accidents or other vandalism, one was caused by an animal, and the cause was undetermined as to four. (See also, CG&E Ex. 2, at 15-16; CG&E Ex. 2, at 6-7.)

The relevant question, as noted above, is the extent to which these outages were within the control of CG&E. Equipment failure is the most obviously under CG&E's control. However, 5 incidents of equipment failure in the course of more than three and

one-half years are not excessive, and certainly will not give rise, on its own, to a finding of inadequate service.

The largest group of these outages was caused by storms; both summer storms giving rise to lightning, wind, and heat problems, and winter storms causing issues with ice and wind. While the weather itself is not within CG&E's control, it is foreseeable that bad weather conditions will affect its systems. Therefore, it is incumbent upon CG&E to design and operate its system so as to minimize the negative impact of severe weather to the extent reasonably possible, and to repair it promptly. Appropriate redesign of the system may also be called for in certain circumstances.

The outages caused by contamination of the lines were all apparently related to part of the Franklin 43 distribution being located in the vicinity of an asphalt roofing manufacturer which was apparently contaminating the lines and insulators with a tar-like substance. The manufacturing operations of that company were, of course, not within CG&E's control. However, CG&E's inspection procedures to find this contamination and its repair and redesign of the system are the issues which it can control and which will determine whether or not these outages are evidence of inadequate service.

Vehicular accidents, entirely outside of CG&E's control, resulted in one outage. Children's toys becoming entangled in the lines, similarly uncontrollable, were the cause of three brief outages. One act of vandalism destroyed insulators, causing an unforeseeable outage.

The Commission also notes that many of the stipulated outages were of extremely brief duration. It is true that some customers are seriously affected by even one second outages. Mr. Thomas D. Crockett, an employee of Miami Wabash, testified that all of the motors on the paper coating equipment trip out with even an extremely short outage. He stated that the machinery processes up to 1,500 feet of paper per minute. According to Mr. Crockett, when the coating machine shuts down, the continuous web of paper breaks and can wrap itself around pieces of equipment, and large amounts of the coating can be spilled into areas that need to be cleaned before the machine can be restarted. He indicated that the economic effects of an outage can be felt in a number of ways. (Tr. I at 61-63.) To show the effect of the outages, Miami Wabash produced a chart correlating each outage with the amount of downtime it recorded in its operations (Miami Wabash Ex. 1).

While the Commission is not unsympathetic, the number and nature of the outages, from CG&E's vantage point, are the relevant issue, together with its design, operation, inspection, maintenance and repair activities. The effect on an individual customer does not change the length of the outage. It is therefore entirely relevant to note that, of the 48 outages, 17 of them (or more than one-third) were only one second long. A total of 28 (approximately 60 percent) were no more than one minute long. If outages of up to 15

minutes are included, the total rises to 34 (about 70 percent), leaving 14 outages of more than 15 minutes long, over more than three and one-half years.

As the Commission evaluates the number and nature of the outages, it is also noteworthy that a number of the events occurred on the same day or on sequential days. Two outages on June 11 and 12, 1999, were related to level 3 storm damage. On June 27, 1999, two outages resulted from a kite in the lines. October 24 and 25, 2001, resulted in five outages, all listed as a level 3 storm. In the spring of 2002, two storms accounted for seven outages. While repetitive storm-related loss of service may be evidence of an inappropriate level of susceptibility to storm damage, and may require a reasonable provider to consider taking steps to avoid such damage (which will be discussed below), it does not necessarily mean that the service is inadequate, merely due to the raw number of outages.

The parties also discussed at some length CG&E's performance under the Commission's reliability indices, and the relevance of those indices to the present situation. As discussed above, these indices, measuring system-wide performance, are not directly applicable to the issue of the adequacy of service to one individual customer.

Witnesses for Miami Wabash also sought to prove inadequacy of service by comparing the electrical service from CG&E with that experienced at other paper companies. Mr. Robert Kaminski, who was first the engineering maintenance manager and, subsequently, the manufacturing manager at Miami Wabash from April 1999 until December 2001, compared his experience at Miami Wabash with the situation at Westvaco, a paper mill in Wickliffe, Kentucky. He stated that "at Wickliffe, Kentucky, we certainly experienced outages, you know, numbering maybe one, two, three a year versus Miami Wabash they seem to number in the dozens." (Tr. I at 18.) On cross examination he conceded that Westvaco might have up to four or five outages in some years (Tr. I at 37). Similarly, Mr. Crockett discussed the experience of Miami Wabash as compared with his prior employers, including Westvaco in North Charleston, South Carolina; Repap Wisconsin in Kimberly, Wisconsin; Crown Advantage in Kalamazoo, Michigan; Foxford in Kalamazoo, Michigan; and American Paper Mills of Michigan in Kalamazoo, Michigan. He stated that "the best we had [at other employers] was in the two to three outages per year we had and the worst was in the six to seven outages per year range." (Tr. I at 56.) On cross examination, however, Mr. Crockett admitted that he did not know the size of the electrical load at the Westvaco facility where he worked, the voltage at which that plant received its electric service, or whether the Westvaco facility was served by transmission or distribution facilities. Thus, the Commission finds that his comparisons are not useful. Similarly, there is no record before this Commission to show that the comparison drawn by Mr. Kaminski is of similarly situated businesses.

The Commission finds, therefore, that Miami Wabash has not proved that the mere nature and number of outages it experienced, by themselves, evidence inadequate service from CG&E.

### 3. Design, Operation and Maintenance

Distribution facilities are constructed, according to Mr. Ward, based on considerations including wind and ice loading, soil conditions, grounding characteristics of the area, vegetation and safety factors. Mr. Conrad added that distribution systems are designed based on a "complex analysis of facility configuration, voltage selection, and construction standards that account for load density, voltage drop, capacity, cost, and other physical factors." He also noted that the design must be "somewhat dynamic," responding to changes in customer demands. Mr. John C. Procario, Vice President and Chief Operating Officer of Cinergy Corp.'s Regulated Businesses Unit, added that CG&E, in determining those distribution and transmission projects in which to invest, considers various factors, "including the number of customers benefited, the degree of benefit, the cost of the project, and the system impact with and without the project." (CG&E Ex. 2, at 4; CG&E Ex. 1 at 4-5; and CG&E Ex. 4, at 4.)

Mr. Ward testified in some detail about the design of the distribution and transmission facilities serving Miami Wabash. He stated that, as is typical in low population density areas such as Franklin, Ohio, where Miami Wabash is located, the distribution circuit is overhead, on wooden utility poles. These poles provide support, he said, for the conductors which carry the electricity. Mr. Ward explained that conductors are attached to wooden cross arms on the poles with porcelain or polymer insulators. CG&E provides the electricity, in the case of Miami Wabash, at the primary voltage of 12,470 volts through 3-4/0 AL-1/C-15kV concentric neutral cables, directly to a 2,500 KVA transformer which is owned and operated by Miami Wabash, according to Mr. Ward's testimony. He noted further that the transformer reduces the voltage to 480 volts. He confirmed that the distribution system meets all of the requirements of the National Electrical Safety Code. Finally, Mr. Conrad compared Franklin 43 with typical CG&E distribution circuits, noting that Franklin 43 has about 14 miles of line and 370 customers, as compared with a company average of over 20 miles of line and over 1,000 customers. (CG&E Ex. 2, at 3-4; CG&E Ex. 1, at 6. See CG&E Ex. 1, at 4.)

According to Mr. Ward, transmission circuits, which go from generating stations to substations, or from substation to substation, are designed based on considerations which include wind and ice loading, soil conditions, grounding characteristics of the area, vegetation and safety. Mr. Conrad also described design considerations, noting that they are very similar to the considerations in designing a distribution circuit, specifying the overall objective of providing safe and reliable electric energy in a cost-effective manner by transporting bulk amounts of electric energy from generating stations to distribution substations," and adding that this "involves a complex analysis of facility configuration,

voltage selection, and construction standards that account for load density, voltage drop, capacity, cost, right-of-way constraints, maintenance needs and other factors." (CG&E Ex. 2, at 9; CG&E Ex. 1, at 8.)

Mr. Ward explained the transmission of electricity to Franklin 43 as being provided by two circuits: 5665 and 3766. He stated that circuit 3766 was newly constructed in the spring of 2002. Both of these circuits are supported by wooden poles (except for the crossing of the Great Miami River by circuit 3766, which is on steel poles), with aluminum conductors and porcelain or polymer insulators on the poles or on cross arms and with lightning protection provided by aluminum shield wire that is grounded at each supporting structure, according to Mr. Ward. He confirmed that the circuits are designed and constructed in accordance with the National Electrical Safety Code. He noted that the Franklin substation, which is fed by circuit 5665 from both the Carlisle and the Todhunter substations, is 2.4 miles from the Carlisle substation and 19.8 miles from the Todhunter substation, with the total miles of exposure for the circuit being about 27 miles. The new circuit, 3766, is fed only by the Carlisle substation (which is 2.9 miles away) and has about 11 miles of total exposure, with connecting ties to three other transmission circuits, according to Messrs. Ward and Conrad. (CG&E Ex. 2, at 8-9; CG&E Ex. 1, at 7.)

Mr. Conrad and Mr. Ward also testified regarding the procedures that CG&E has in place to monitor, identify and track outages. According to Mr. Conrad, the company uses four computerized systems: Supervisory Control and Data Acquisition (SCADA), Trouble Call Outage Management System (TCOMS), Electric Trouble data mart (ET), and Outage Information System (OIS). Each has a different function. Mr. Conrad stated that SCADA takes care of monitoring "status points, voltages, power flow, equipment temperatures" and other information through the entire system from the generator down to distribution feeders, providing alarms to operators if there are problems and automatically logging all events. He described TCOMS as a "computer-based system that tracks and analyzes outages on distribution feeders," using "computer models of distribution feeder connections and customer trouble call information to identify and localize problems" in real time. Mr. Conrad explained the procedure further, stating that SCADA initially will detect an outage, allowing an operator to enter the information in TCOMS and that each customer call the company receives is also recorded in TCOMS, allowing TCOMS to determine the probable number of customers out of service and the probable location of the outage for the dispatch of repair crews. TCOMS can also track the progress of the repair as the operator receives information from field crews and updates information in the system, according to Mr. Conrad. Finally, he said that ET is a "data repository for customer outage information" from both TCOMS and previous tracking systems, and that OIS is used "to track transmission outages and substation outages," as well as outages at the distribution feeder level. (CG&E Ex. 1, at 10-12. See also CG&E Ex. 2, at 13.)

Mr. Ward testified regarding regular maintenance practices of CG&E. He noted that all construction and maintenance activities are performed by journeyman linepersons

who have received three to five years of training, including both classroom learning and job experience. The Franklin 43 circuit, according to Mr. Ward, is fully inspected and trimmed on a periodic basis to identify problems which need to be corrected. As to transmission facilities, he stated that the company performs a semi-annual aerial inspection of all lines and an annual ground inspection and treatment program of ten percent of wood transmission poles, removes vegetation every four years, and inspects substations monthly. (Ex. 2, at 5, 6-7, 10; Tr. II at 12; and Tr. II at 26-27.)

Mr. Kaminski, of Miami Wabash, stated his opinion that the building of the new transmission lines near the plant evidenced "some sort of capacity problem in that area on that feeder that seemed to cause numerous outages." (Tr. I. at 23, 25, and 41.) On cross examination, however, Mr. Kaminski admitted that some of the outages occurred during storms and that it makes sense that the electrical load on CG&E would drop during a storm as air conditioning use drops. He also confessed that he had not correlated any of the outages to the hottest days of the year when the system would be at its peak use. (Tr. I at 42-44.)

The Commission finds that Miami Wabash has not provided sufficient evidence that CG&E's design, operation or maintenance of its facilities was inadequate. From the evidence presented, the Commission believes that CG&E had in place the appropriate policies and procedures for the design, operation, and maintenance of its facilities in question. Having determined that the number and nature of the outages experienced by Miami Wabash were not sufficient evidence of inadequate service, and that the design, operation, and maintenance of CG&E's facilities were adequate, the Commission therefore finds that Miami Wabash has not shown that a significant number of the outages were within the control of the utility, or were avoidable by the utility. The service received by Miami Wabash from CG&E was therefore, in these respects, adequate.

#### 4. Repair

The remaining issue is whether or not CG&E responded appropriately to the outages as they occurred.

Miami Wabash argues that CG&E did not respond to its outages in a timely fashion. Miami Wabash asserts that "by taking 27 and 43 months, respectively, to adequately inspect and repair the obvious deficiencies to its facilities, CG&E did *not* timely respond to Miami Wabash's complaints." (Miami Wabash brief at 7.) Prior to considering the details of Miami Wabash's contention, it will be helpful to consider the outages and the responses, as they occurred in time. This opinion and order will therefore reproduce the dates and causes of outages from the chart above, reorganized in time sequence, and will add a column showing the maintenance and repair activities undertaken by CG&E. All CG&E actions are italicized:



Date	Cause <sup>9</sup>	Actions Taken <sup>10</sup>
<i>February 1995</i>		<i>Regular full circuit inspection<sup>11</sup></i>
<i>During 1999</i>		<i>Regular ground inspection of all wood transmission poles<sup>12</sup></i>
January 2, 1999	Defective capacitor	
January 19, 1999	Unknown	
February 7, 1999	Wind	
May 17, 1999	Animal	
June 11, 1999	Cable fault, level 3 storm	
June 12, 1999	Level 3 storm # 9 (heat & thunderstorms)	
June 27, 1999	Kite in line upon inspection	
June 27, 1999	Kite in line upon inspection	
<i>July 1999</i>		<i>Regular full circuit tree trimming<sup>13</sup></i>
September 29, 1999	Lightning	September 29, 1999
October 13, 1999	Level 3 storm	
March 11, 2000	Gallopings conductors - ice & wind	
March 13, 2000	Toy rocket in line upon inspection	
March 14, 2000	Vandalism-insulators shot off	
<i>No date given</i>		<i>Notified police of vandalism and toys<sup>14</sup></i>
<i>No date given</i>		<i>Ongoing community safety program<sup>15</sup></i>
June 16, 2000	Level 2 storm # 7	
June 27, 2000	Jumper burnt off	
August 3, 2000	Lightning	
September 2, 2000	Lightning	
October 15, 2000	Unknown	

<sup>9</sup> The causes shown in this table are from Exhibit CDW-1 to CG&E Ex. 2.

<sup>10</sup> This column lists all maintenance and repair activities about which specific testimony was presented, but does not attempt to include regularly scheduled maintenance activities that were not specifically discussed.

<sup>11</sup> Tr. II at 12; CG&E Ex. 2, at 6; and CG&E Ex. 4, at 15.

<sup>12</sup> CG&E Ex. 2, at 10.

<sup>13</sup> Tr. II at 26; CG&E Ex. 2, at 6; and CG&E Ex. 4, at 15.

<sup>14</sup> Tr. II at 64-65; CG&E Ex. 2, at 20.

<sup>15</sup> Tr. II at 65.

Date	Cause	Actions Taken
January 2001		Capacitor bank added for voltage control
February 15, 2001	Recloser damage at Red Lion substation	
March 2001		Regular full circuit inspection <sup>16</sup>
May 16, 2001	Storm	
June 12, 2001	Level 3 storm (lightning)	
June 2001		Regular annual inspection of all circuit capacitor controls <sup>17</sup>
July 3, 2001	Switch failure	
July 27, 2001	Auto accident	
July 31, 2001	Unknown	
August 4, 2001	Vandalized & contaminated insulators upon inspection	
August 11, 2001	Lightning	
September 7, 2001	Vandalized & contaminated insulators	
September 20, 2001	Vandalized & contaminated insulators upon inspection	
September 28, 2001	Cable failure	
October 4, 2001	Vandalized & contaminated insulators upon inspection	
October 9, 2001		Emergency full circuit inspection <sup>18</sup>
October 24, 2001	Level 3 storm (lightning)	
October 25, 2001	Level 3 storm (wind)	
October 25, 2001	Level 3 storm (wind)	
October 25, 2001	Level 3 storm (wind)	
October 25, 2001	Level 3 storm (wind)	
October 2001		Preventative maintenance on circuit breaker <sup>19</sup>
October 2001		Replaced crossarms and insulators at IKO Asphalt <sup>20</sup>

<sup>16</sup> CG&E Ex. 2, at 6; and CG&E Ex. 4, at 15.

<sup>17</sup> Tr. II at 26; CG&E Ex. 2, at 6; and CG&E Ex. 4, at 15.

<sup>18</sup> CG&E Ex. 2, at 6; CG&E Ex. 4, at 15.

<sup>19</sup> Tr. II at 19, 67; and CG&E Ex. 2, at 21.

<sup>20</sup> Tr. II at 20, 22-23; and CG&E Ex. 4, at 15.

Date	Cause	Actions Taken
<i>By end of October 2001</i>		<i>Replaced broken or chipped insulators<sup>21</sup></i>
<i>By end of October 2001</i>		<i>Installed additional squirrel guards<sup>22</sup></i>
<i>December 2001</i>		<i>Full circuit tree trimming (earlier than usual four year cycle)<sup>23</sup></i>
<i>February 2002</i>		<i>Finished upgrade of conductor size for one more emergency tie<sup>24</sup></i>
<i>March 9, 2002</i>	Level 3 storm #2 (wind)	
<i>Spring 2002</i>		<i>Completed construction of additional 69kV feed<sup>25</sup></i>
<i>April 28, 2002</i>	Level 2 storm #9 -possibly wind	
<i>April 28, 2002</i>	Level 2 storm #9 -possibly wind	
<i>April 28, 2002</i>	Level 2 storm #9 -possibly wind	
<i>April 28, 2002</i>	Level 2 storm #9 -possibly wind	
<i>May 25, 2002</i>	Insulator failed possibly due to lightning (during level 1 storm #11)	
<i>May 25, 2002</i>	Reopened to strap disconnect switch	
<i>May 25, 2002</i>	Feeder tripped while attempting to restore remainder of circuit - led to discovery of insulator likely causing first outage	
<i>May 26, 2002</i>		<i>Replaced failed disconnect switch<sup>26</sup></i>
<i>May 2002</i>		<i>Installed spacers for wind clearance<sup>27</sup></i>

<sup>21</sup> Tr. II at 22; CG&E Ex. 2, at 6; and CG&E Ex. 4, at 15.

<sup>22</sup> Tr. II at 22; CG&E Ex. 2, at 6; and CG&E Ex. 4, at 15.

<sup>23</sup> Tr. II at 26; CG&E Ex. 2, at 6; and CG&E Ex. 4, at 15.

<sup>24</sup> Tr. II at 21, 27-28; CG&E Ex. 2, at 6-7, 21; and CG&E Ex. 4, at 15.

<sup>25</sup> CG&E Ex. 2, at 21; and CG&E Ex. 4, at 15.

<sup>26</sup> Tr. II at 21.

Date	Cause	Actions Taken
May 2002		Regular inspection of transmission lines <sup>28</sup>
June 26, 2002	Level 2 storm #16 - possibly lightning	
July 19, 2002	Level 1 storm #18 (lightning)	
July 27, 2002	Lightning	
July 29, 2002	Level 3 storm #20 (lightning) - static in primary	
June or July 2002		Inspected circuit with PUCO staff <sup>29</sup>
July 2002		Completed relocation of circuit around IKO Asphalt <sup>30</sup>
August 1, 2002	Unknown	

Miami Wabash's contention with regard to repairs can now be considered more fully. Noting that its outages have substantially ceased,<sup>31</sup> Miami Wabash points out that "CG&E did not conduct a full line inspection of its facilities serving Miami Wabash until two years and three months (27 months) after Miami Wabash began complaining of outages" and "did not complete its repairs to restore adequate service to Miami Wabash until 43 months into the 44-month Complaint period." (Miami Wabash reply brief at 15, 16.) It argues that "[t]he unavoidable fact is that if CG&E had just timely responded to conduct an adequate line inspection, Miami Wabash would likely not be seeking relief before this Commission for the harm caused to its business activities." (Miami Wabash reply brief at 2.)

There are several difficulties with this line of reasoning. First, Miami Wabash apparently posits that it was reasonable for CG&E to conduct a complete line inspection after the initial outages. Second, the reasoning assumes that all outage-causing circumstances were discoverable at the time of the inspection that was actually done 27 months into the relevant period. Finally, according to this logic, all, or most, outages would have been resolved or avoided by the repairs done as a result of that inspection.

The first suggestion is clearly false. After the first six months of 1999, for example, there had been several outages, but they were caused by unrelated factors: one was defective equipment, one was wind, one was an animal, two were storms, and two were toys. While this was more outages than anyone would like to experience, there was no

<sup>27</sup> Tr. II at 26; CG&E Ex. 2, at 6, 22; CG&E Ex. 4, at 15.

<sup>28</sup> CG&E Ex. 2, at 10.

<sup>29</sup> Tr. II at 11.

<sup>30</sup> Tr. II at 23; CG&E Ex. 2, at 7, 22; and CG&E Ex. 4, at 15.

<sup>31</sup> Tr. I at 68-69; Miami Wabash brief at 10, 31; Miami Wabash reply brief at 2, 16, 20.

repetitive circumstance that might have given a reasonable provider cause to make a full circuit inspection. If the early stages of the complaint period are analyzed in this fashion, it becomes clear that, prior to the regular full circuit inspection in March 2001, CG&E did not observe any phenomena that should reasonably cause it to undergo a special inspection of the entire circuit. Only after the summer and fall of 2001 would such an undertaking have appeared reasonable and, of course, it was in October 2001 that the emergency inspection actually occurred.

The second assumption is clearly false, as well, inasmuch as the contamination caused by the asphalt roofing company was not discovered during the full circuit inspection in March 2001. No proof was offered either that the March 2001 inspection was incomplete or inadequate, or that the contamination was in existence at that time. Indeed, the first reference in the record to possible contamination appears in August of 2001. This was well after the March 2001 inspection. Hence, there is no evidence whatsoever that an earlier inspection by CG&E would have discovered the incipient contamination.

Finally, as to the third difficulty with Miami Wabash's reasoning, it is clear that few of the early outages in the list would have been resolved or avoided by the actions undertaken as a result of the 2001 inspections. According to the testimony of Mr. Ward, as a result of the October 2001 inspection, CG&E began the process of relocating the lines away from the asphalt roofing plant, replaced some contaminated crossarms and insulators, replaced some broken and chipped insulators, and added squirrel guards.<sup>32</sup> A review of the causes shown for the outages prior to that date results in the conclusion that very few of the outages could have been avoided if those actions had been taken in early 1999 instead of late 2001.

Miami Wabash cites Rule 4901:1-10-27(D), O.A.C., for the proposition that CG&E is obligated to inspect its facilities to maintain reliable service. However, this rule does not mean that an electric utility is required to perform a full circuit inspection every time an outage occurs, even when its cause has been established or when it is an occasional event. Rather, when the nature and number of outages is such that the utility should reasonably conclude that an unidentified problem exists, then additional inspection is appropriate. CG&E took precisely this action when the events during the summer of 2001 made it clear that an unusual situation had arisen.

Following five fall outages, in 2001, immediately after the emergency inspection, CG&E performed a full circuit tree trimming. This was just over two years following a regular full circuit tree trimming, when such trimming is usually done on a four-year cycle. More storm-related outages occurred the following spring. CG&E then added spacers for additional wind clearance. Should the company have added these spacers

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<sup>32</sup> Tr. II at 21-24; CG&E Ex. 2, at 6. No repairs appear to have been taken specifically in response to the March 2001 inspection (27 months into the period in question).

after the fall outages? Apparently they were necessary, as the wind-related outages ceased after the spacers were added. However, the company did make a substantial effort to prevent the impact of the wind by trimming all of the trees on the entire circuit. The Commission has heard no testimony that would lead to the conclusion that it was unreasonable for it to attempt to solve the problem initially by tree trimming rather than by the installation of spacers. Therefore, the Commission can not conclude that this was the provision of inadequate service.

The Commission finds that the actions taken by CG&E to repair its distribution and transmission lines serving Miami Wabash were reasonable and adequate.

C. Administrative Rule Requiring Inspections, Maintenance, Repair and Replacement to Provide Reliable Service

Rule 4901:1-10-27, O.A.C., provides, in subsection (D), that electric utilities will inspect their facilities "to maintain safe and reliable service." It also provides, in subsection (E)(1), that electric utilities will establish preventative inspection, maintenance, repair and replacement programs "to maintain safe and reliable service." Miami Wabash argues that CG&E should have performed a full circuit inspection of Franklin 43 prior to March 2001, as the specific schedule for inspections is only a minimum requirement. It emphasizes the rule's language expecting the maintenance of "reliable" service. (Miami Wabash reply brief at 15-18.)

CG&E responds to this argument by controverting the theory that there was any call for an additional circuit inspection prior to 2001. It also submits that its additional specific inspections, performed prior to the full circuit inspection, were reasonable and appropriate. (CG&E reply brief at 2-6.)

The Commission agrees with CG&E on this point. As has been thoroughly discussed above, a reasonable electric utility, faced with the outages in 1999 and 2000 on the Franklin 43 circuit, would not have deemed it necessary to perform a full circuit inspection. The language in Rule 4901:1-10-27, O.A.C., although expressing that reliable service is to be maintained, does not impose any additional requirement on the company that is not already compelled by statute.

D. CG&E Tariff Language

In its tariff, as quoted above, CG&E expressly declares that it does not guarantee that its service will be free of outages. However, it does promise that it "will make reasonable provisions to supply satisfactory and continuous electric service." It further maintains that it will not be liable for damages from outages caused by "accident or casualty, extraordinary action of the elements, . . . or by any cause which the Company could not

have reasonably foreseen and made provision against." CG&E's Tariff, P.U.C.O. Electric No. 19, Sheet No. 21, Section II - Supply and Taking of Service.

Miami Wabash proposes that "the vast majority of the outages were *not* due to *extraordinary* weather and other *unforeseeable* factors . . ." (Miami Wabash Brief at 6.) Therefore, it suggests, CG&E's service did not comply with its tariff provisions.

For its part, CG&E asserts that "Miami Wabash has provided no evidence in support of its 'submission' that the weather-related outages occurred during normal weather conditions, nor that the third party events causing other outages should be considered normal operating conditions." Further, it maintains that "insulators being shot at and damaged by vandals, children's toys being caught in the power lines, and tar-like buildup on electric facilities" are not "foreseeable and preventable events." (CG&E reply brief at 12-13.)

Considering the tariff language one provision at a time, the Commission has already discussed the reasonableness of CG&E's design, operation, inspection, maintenance and repair activities. Therefore, CG&E shall be deemed to have made "reasonable provisions to supply satisfactory and continuous electric service."

The tariff specifically allows CG&E to avoid liability for damages due to accidents. This clearly covers vehicular accidents, and could also be deemed to include the accidental entanglement of toys in the lines, and breakage of insulators.

Extraordinary weather may cause outages for which the company is not liable. The word "extraordinary" is not defined in the tariff. Dictionary definitions explain the term as "beyond or out of the common order or method; not usual, customary, regular, or ordinary" or "exceeding the common degree, measure, or condition; hence, uncommon; remarkable." Webster's New International Dictionary, 2<sup>nd</sup> Edition Unabridged, 1941. Clearly, blue skies and rainy weather are both common. Even thunderstorms are common. However, thunderstorms that include extremely high winds are not common. There may be a level of storm activity for which an electric utility should anticipate and for which it should prepare ahead of time. However, in this case, Miami Wabash presented no evidence to show that the level of storm activity experienced in the Franklin 43 area was not extraordinary. The Commission can only rely on CG&E's categorization of the storms in question, noting that most of them were level two or level three storms, each leaving tens of thousands, or up to a hundred thousand customers, out of power. This is not a common event. Miami Wabash has therefore not met its burden to prove that CG&E has failed to perform according to its tariff.

### E. Mitigation and Extra Sensitivity of Customer

The parties also argued at great length about the sensitivity of Miami Wabash to even momentary outages that might not affect other customers, and the responsibility that the customer, in such a situation, bears. Mr. Kaminski, on cross-examination, agreed that the paper coating process, by its basic nature, is "more susceptible to the effects of electrical outages than other industrial processes. He also confirmed that Miami Wabash installed a new paper coater during 1997 and 1998 and that this new process is itself more susceptible to the effects of electrical outages than previous processes. (Tr. I at 31.) In light of this situation, CG&E made a number of efforts to counsel Miami Wabash on courses of action that it could take to mitigate the losses it was experiencing as a result of outages. Mr. Kenneth S. Sedziol, Senior Engineer in Power Quality, Operations Engineering, for Cinergy Services, Inc., testified regarding the efforts that he made to suggest actions that Miami Wabash could take to avoid interruptions in its operations. He suggested, among other things, the use of an uninterruptible power supply, dip-proofing inverters, constant voltage transformers and contactor/drive ride through modules to avoid the effects of dips in voltage. (CG&E Ex. 3, at 6.) Mr. Sedziol testified that he had suggested options to mitigate the effects of outages, including a second distribution feed with a static fast-transfer switch, flywheel technology, battery energy storage systems, and a generator. (CG&E Ex. 3, at 8-9.) These efforts were not required by its tariff provisions or by statute or rule.

In this case, the service from CG&E was adequate in all respects. Therefore, the issues of sensitivity and mitigation are moot. Therefore, the Commission will not at this time address the issue of whether an unusually sensitive customer, faced with inadequate service, is required to mitigate its damages to the extent possible.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) CG&E is an electric light company, as defined in Section 4905.03(A)(4), Revised Code, and is a public utility as defined by Section 4905.02, Revised Code.
- (2) Miami Wabash is an industrial consumer which has purchased integrated electric services or electric distribution and transmission services from CG&E during the period from January 1, 1999, through August 22, 2002.
- (3) CG&E is required by Section 4905.22, Revised Code, to furnish necessary and adequate service and facilities, and to furnish and provide such instrumentalities and facilities as are adequate and in all respects just and reasonable.



- (4) CG&E is required by its tariff to make reasonable provisions to supply satisfactory and continuous electric service. CG&E's tariff provides that it is not liable for any damage or claim of damage attributable to any interrupting or reversal of service caused by accident or casualty, extraordinary action of the elements, action of any governmental authority, litigation, deficiency of supply, or by any cause which the Company could not have reasonably foreseen and made provision against.
- (5) Miami Wabash filed a complaint against CG&E on August 22, 2002. A joint stipulation between the parties as to the date, time, and duration of the outages, and as to the issues to be considered, was filed with the Commission on December 4, 2002. A public hearing was held on December 10 and 11, 2002.
- (6) The burden of proof in a complaint proceeding is on the complainant. *Grossman v. Public Utilities Commission*, 5 Ohio St.2d 189, 214 N.E.2d 666 (1966).
- (7) During the period from January 1, 1999, through August 22, 2002, 48 electrical outages affected service to Miami Wabash, as stipulated by the parties, which outages ranged in duration from one second to six hours and nineteen minutes.
- (8) CG&E investigated the causes of the 48 outages and reported on the results of those investigations as set forth in this opinion and order.
- (9) CG&E took actions to repair its facilities, to trim trees along the circuits serving Miami Wabash, notified police of vandalism and toys caught in lines, organized ongoing safety programs, added a capacitor bank for voltage control, fully inspected the circuit on a regular and an emergency basis, inspected all circuit capacitor controls on a regular basis, performed preventative maintenance on a circuit breaker, replaced crossarms and insulators near an asphalt roofing plant, replaced broken or chipped insulators, installed additional squirrel guards, performed an early full circuit tree trimming operation, upgraded conductor size to allow for emergency tie with additional circuit, installed spacers for wind clearance, replaced a failed disconnect switch, relocated circuit lines around an asphalt roofing plant, inspected the circuit with Commission staff, and held numerous meetings with Miami Wabash personnel to discuss outages and possible remedies.

- (10) System-wide performance standards are not relevant to the adequacy of service to an individual customer. Therefore, compliance with such standards does not give rise to a rebuttable presumption of the adequacy of such service.
- (11) Miami Wabash has not proved that CG&E has not made reasonable provisions to supply satisfactory and continuous electric service.
- (12) Miami Wabash has not proved that the service it received from CG&E was inadequate, either under statutory or tariff requirements.
- (13) The electric services provided by CG&E to Miami Wabash were not inadequate.

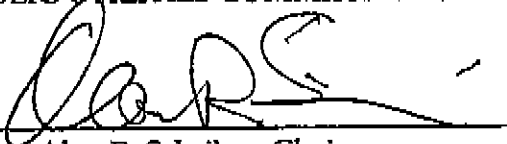
ORDER:

It is, therefore,

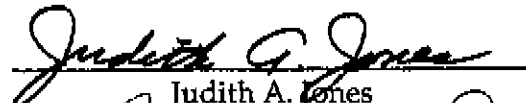
ORDERED, That both complaints of Miami Wabash, in Case Nos. 02-2162-EL-CSS and 01-3135-EL-CSS, be dismissed, and that these cases be closed of record. It is, further,

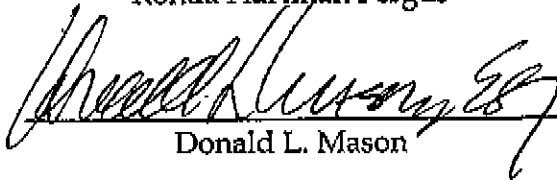
ORDERED, That a copy of this opinion and order be served upon all parties of record.

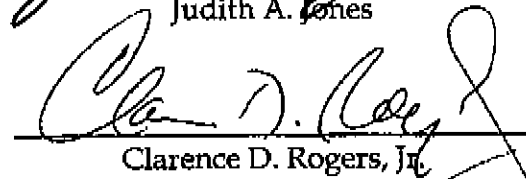
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Alan R. Schriber, Chairman

  
Ronda Hartman Fergus

  
Judith A. Jones

  
Donald L. Mason

  
Clarence D. Rogers, Jr.

JWK:geb

Entered in the Journal

SEP 23 2003



Renee J. Jenkins  
Secretary