FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaints of S. G. Foods, Inc.; Miles Management Corp., et al.; Allianz US Global Risk Insurance Company, et al.; and Lexington Insurance Company, et al.,		
Complainants,		
v.	Case Nos.	04-28-EL-CSS 05-803-EL-CSS 05-1011-EL-CSS 05-1012-EL-CSS
The Cleveland Electric Illuminating Company, Ohio Edison Company, Toledo Edison Company, and American Transmission Systems, Inc.,		
Respondents.		

ENTRY

The attorney examiner 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) The complainants in these consolidated proceedings filed their complaints on January 12, 2004, June 21, 2005, and August 15, 2005. In each case, the complainants allege, *inter alia*, that the Cleveland Electric Illuminating Company, Ohio Edison Company, Toledo Edison Company, and/or American Transmission Systems, Inc. (collectively, the respondents) failed to furnish necessary and adequate service and facilities to the complainants and that the service and/or facilities provided by one or more of those respondents were at least partially responsible for causing the blackout, thereby causing financial harm to the complainants.

(3) In this entry, the attorney examiner will rule on four procedural motions that were filed by the parties in these proceedings:

(a) Respondents' April 18, 2007, second motion to compel discovery from the complainants in Case Nos. 05-1011-EL-CSS and 05-1012-EL-CSS (insurance complainants);

(b) Respondents' May 3, 2007, motion for reconsideration of the April 30, 2007, attorney examiner's entry extending the procedural schedule;

(c) Motions for admission *pro hac vice* filed by the insurance complainants on April 25, 2007, and May 4, 2007; and

(d) Joint motion for stipulated protective order filed on May 7, 2007, by the respondents and the insurance complainants.

Respondents' Second Motion to Compel Insurance Complainants

(4) On April 18, 2007, the respondents filed a second motion to compel discovery directed at the insurance complainants' responses to Interrogatory No. 4 and Request for Production No. 4. According to the respondents, these discovery requests are directly relevant to the insurance complainants' standing to maintain their claims in this case. Respondents state that, to establish standing as subrogees, the insurance "[c]omplainants must show two things: (1) that they paid claims for damages caused by [r]espondents' actions, which resulted in the August 14, 2003 outage; and (2) that they paid those claims pursuant to a duty to do so under an insurance policy." The insurance companies filed a response to the respondents' motion to compel on April 30, 2007, and the respondents' filed a reply on May 3, 2007.

(a) Interrogatory No. 4 requests information pertaining to any surge protection, voltage regulation, other protective equipment, stand-by generation, backup power supply, or alternative electrical supply utilized by the insureds. Respondents maintain that this information is

relevant to the insurance complainants' standing to maintain their claims as subrogees and in determining whether the respondents provided inadequate service. According to the respondents, it is impossible to determine if the respondents provided inadequate service or if the insurance complainants appropriately paid insurance claims without examining the role of the insureds' own back-up facilities. Respondents submit that, if this discovery request reveals that some insureds sustained losses because of their own faulty backup equipment, the insurance complainants' claims would fail, both because of a lack of standing and because inadequate service would not have been proved. Respondents maintain that they have a right to defend themselves and to demonstrate that the damage resulted from the failure of the insureds' back-up systems. The insurance complainants cite *In re Miami Wabash Paper LLC v. Cincinnati Gas and Electric, Co.*, Case Nos. 02-2162-EL-CSS and 01-3135, Opinion and Order (September 23, 2003), for the proposition that "an 'inadequate service' claim is not limited only to service provided by the utility." (Motion to Compel at 5.) In their reply, once again, they cite *Miami Wabash* as support for the proposition that "[i]n addition to showing a loss of service, a complainant must also show that it suffered some damage or loss and that this damage resulted from inadequate utility service, as opposed to inadequate customer facilities."

The insurance complainants object to this request, stating that the information is beyond the scope of the Commission's proceedings, irrelevant, and not likely to lead to the discovery of admissible evidence, and that, to the extent that the information exists, it is contained in the claim files previously provided to the respondents. The insurance complainants state that, while the question of whether an insureds' own negligence may have contributed to its loss may some day be

litigated in court, this issue will not be litigated before the Commission. According to the insurance complainants, the Commission will only answer the question of whether the respondents have provided adequate service or facilities to customers and all other issues will need to be resolved in a subsequent lawsuit in court.

Inadequate service claims arise under Section 4905.26, Revised Code. That statute does not require that complainants show damages in order to file a complaint with the Commission alleging inadequate service. The question of damages is not one that will be litigated before the Commission, but rather before a court of competent jurisdiction. Therefore, evidence that relates only to damages will not be admissible in this proceeding.

The respondents attempt to argue that evidence relating to the insureds' backup equipment will somehow address issues other than damages. With regard to both the standing issue and the substance of inadequacy of service, the respondents posit that the "service" in question covers both the service from the utility and the functioning of a customer's facilities. They cite *Miami Wabash* as support for this proposition. In the motion, a footnote describes that case as one in which "the utility defended the claim, in part, by presenting evidence that the customer's own paper-coating process was to blame for the inadequacy of the service." (Motion to Compel at 5.) The examiner would note that, in that case, no claim was made that the paper-coating process actually caused outages. Rather, that respondent claimed that the paper-coating process made the complainant hypersensitive. According to the respondent in *Miami Wabash*, the complainant should have, because of that hypersensitivity, taken steps to mitigate the effects of outages on its business.

Continuing with the respondents' footnote, they do correctly note that the Commission did not, in *Miami Wabash*, reach the merits of the argument (that the paper-coating process was "to blame" for service inadequacy). They suggest that what is relevant is "that the utility was allowed to introduce evidence of the customer's own facilities and operations in assessing the adequacy of service." The examiner would point out that the evidence in *Miami Wabash* related to a possible duty to mitigate damages. The Commission, in its opinion and order, specifically framed the issue in this regard, stating that the question was moot in light of its finding that service was adequate and that it would not "address the issue of whether an unusually sensitive customer, faced with inadequate service, is required to mitigate its damages to the extent possible." Thus, this evidence was not addressed in any way by the Commission in its consideration of the adequacy of service. The conclusion that service was adequate was reached before the Commission stated that the issue of a possible responsibility to mitigate was moot. Thus, evidence relating to the customer's facilities in that case did not relate to the assessment of the adequacy of service.

The respondents also rely on two other precedents for the proposition that, "[w]here the customer's own facilities are responsible for service interruption, the Commission may consider them." *Kohli v. Pub. Util. Comm.*, 18 Ohio St. 3d 12 (1985); *In the Matter of the Complaint of Carpet Color System v. Ohio Bell Telephone Co.*, Case No. 85-1076-TP-CSS. They ask that discovery be compelled so that they can "gather information regarding the nature and state of repair of the insureds' back-up facilities and their potential role in causing the damage at issue."

It is critical, in considering the motion to compel discovery regarding back-up facilities, to keep in mind the use of the word "cause." The

respondents argue in terms of causation of the damage. However, it is actually causation of the outage that is relevant. Note that, even as described by respondents, *Kohli* and *Carpet Color* actually considered whether the complainants' own equipment caused the "problem," not the damage. If the Commission were to consider how the damage was caused, then it would, by definition, be considering mitigation, as well. The question before the Commission goes to the adequacy of the service, by the respondents, to the customers.

Therefore, the examiner fails to see how the information requested by the respondents in Interrogatory No. 4 is relevant and likely to lead to the discovery of admissible evidence in the cases pending before the Commission. The examiner agrees with the respondents insofar as they maintain that, for the insurance companies to be appropriate subrogees and represent the insureds in these matters, they must have paid an insurance claim resulting from the alleged inadequate service in these proceedings to the insureds. If the respondents are trying to discern whether the complainant insurance companies are appropriate subrogees, they should review the claim files to determine if the complainant insurance companies did, in fact, pay a claim to the insureds for the time period in question. Information beyond this inquiry relating to information such a back-up power pertains to damages, and damages are not at issue in these cases before the Commission. Accordingly, the respondents' motion to compel discovery for Interrogatory No. 4, should be denied.

(b) Request for Production No. 4 asks for the insureds' underwriting files. According to the respondents, this information could reveal "the insurers' risk evaluation and conditions or restrictions on coverage, which, if violated, could invalidate the policy." Respondents argue that

this request is relevant and discoverable because it may contain assessments of the insureds' back-up power systems and because it may contain information relating to the insurers' standing as subrogees. The respondents submit that, if the insurers were not obligated to pay claims under their policies, they do not have standing to maintain their claims.

The insurance complainants object to this request stating that the information is beyond the scope of the Commission proceedings, irrelevant, and not likely to lead to the discovery of admissible evidence. According to the insurance complainants, the defense that there is some limitation in the underlying insurance policy and, therefore, there was actually no coverage for an insureds' loss, is beyond the scope of the Commission's jurisdiction and is more appropriately brought in a tribunal intended to resolve questions regarding insurance coverage. Furthermore, the insurance complainants point out that all of the pertinent information has been provided or will be provided to the respondents in the form of the insurance policies themselves. The insurance complainants aver that, "[i]f the policy language is clear and unambiguous, Ohio law forbids any consideration of extrinsic evidence (such as underwriting files) in determining whether there was coverage for a particular insureds' loss."

It appears that the respondents are seeking information from the underwriting files that will negate the insureds' claims to the insurance complainants. Again, these cases are not about damages and the Commission will not be addressing the issue of whether the insureds' claims were or were not appropriately paid. Rather, the Commission will be considering the allegations made by the insurance complainants, on behalf of the insureds to which claims were paid, that the respondents provided inadequate

service. With that scope in mind, the underwriting files are not relevant in these proceedings. For purposes of these proceedings, the respondents should look to the policies which the insurance complainants state they have provided or will be providing for the information relevant to these cases. Accordingly, the respondents' motion to compel discovery for Request for Production No. 4 is denied.

Respondents' Motion for Reconsideration of the Extension of the Procedural Schedule

(5) At a prehearing conference in this matter held on October 25, 2006, the parties and the examiner discussed the schedule for the completion of discovery, the filing of testimony, and the hearing. The schedule for these proceedings was determined at that conference, and was subsequently ordered, by entry dated October 26, 2006.

(6) On April 3, 2007, the insurance complainants filed a motion for an extension of the procedural schedule and a motion for continuance of the hearing as established in the attorney examiner's October 26, 2006, entry, for a period of 120 days. On April 10, 2007, respondents filed a memorandum contra the insurance complainants' motion for a continuance of the hearing.

(7) By entry issued April 30, 2007, the attorney examiner concluded that, while a 120-day extension was not necessary, a shorter extension would be appropriate. Accordingly, the attorney examiner set forth a revised schedule for these proceedings and changed the date for the commencement of the hearing from the original date of October 16, 2007, to January 8, 2008.

(8) On May 3, 2007, the respondents filed a motion for reconsideration of the decision in the April 30, 2007, attorney examiner's entry to extend the procedural schedule in this case. Respondents state that the insurance complainants did not demonstrate good cause, as required by Rule 4901-1-13, Ohio Administrative Code (O.A.C.), to extend the schedule. According to the respondents, the original procedural schedule gave the parties a year to prepare for hearing and the insurance

complainants wasted several months by not engaging in discovery. Respondents argue that the delay by the insurance complainants in prosecuting this case has resulted in substantial prejudice to the respondents. Respondents contend that witnesses' abilities to recall the events have faded, some witnesses have retired, and other witnesses are in poor health. On May 7, 2007, the insurance complainants filed a response to respondents' motion for reconsideration, and on May 8, 2007, the respondents replied.

(9) While the attorney examiner acknowledges the concerns raised by the respondents regarding the extension of the procedural schedule, it is necessary that all parties have an opportunity to complete discovery and that sufficient time is allotted in the scheduling of all phases of the proceeding to enable all parties to prepare adequately for the hearing. With the exception of the respondents' attempt to change to the structure of the schedule in these cases, the respondents did not raise any new issue that was not thoroughly reviewed previously. The attorney examiner continues to believe that, given the on-going disputes and status of discovery, it is necessary to grant a brief extension. However, in light of the fact that these proceedings have been going on for an extended period, any further requests for delay will not be granted. Accordingly, the respondents request for reconsideration is denied.

Motion for Admission *Pro Hac Vice*

(10) On April 25, 2007, motions for admission *pro hac vice* were filed by the insurance complainants to admit Gary R. Chopp and Melinda A. Davis to practice before the Commission in these proceedings for the insurance complainants. On May 7, 2007, a motion for admission *pro hac vice* was filed by the insurance complainants to admit Charles R. Tuffley to practice before the Commission in these proceedings for the insurance complainants. The attorney examiner finds that the motions for admission *pro hac vice* should be granted.

Joint Motion for Stipulated Protective Order

(11) On May 7, 2007, the respondents and the insurance complainants filed a joint motion requesting approval of a proposed protective order. The parties state that they have

agreed to the proposed protective order in an effort to facilitate the discovery of certain trade secrets and critical infrastructure information. The examiner understands that, during discovery, parties may need to share information that they wish to ensure remains confidential. Rule 4901-1-24, O.A.C., provides that the examiner may, upon motion made, issue an order providing that confidential information not be disclosed or be disclosed only in a designated way. However, that rule also states that no such motion may be filed until the moving party "has exhausted all other reasonable means of resolving any differences with the party seeking discovery." Further, the motion must be accompanied by a memorandum in support, setting forth the specific basis of the motion; copies of subject discovery requests; and an affidavit of counsel setting forth efforts made to resolve differences with the party seeking discovery. These requirements were not met in this motion. Further, the rule does not provide for the issuance of a general protective order, covering unspecified future materials. Therefore, the motion will be denied. The attorney examiner would note, however, that nothing prevents the parties from entering into an enforceable confidentiality agreement on substantially the terms set forth in their proposed order. The examiner would also point out that, in the event that confidential information must be filed with the Commission, Rule 4901-1-24(D), O.A.C., sets forth procedures for the issuance of protective orders relating to such filings.

It is, therefore,

ORDERED, That the respondents' second motion to compel discovery from the insurance complainants be denied. It is, further,

ORDERED, That the respondents' motion for reconsideration of the extension of the procedural schedule be denied. It is, further,

ORDERED, That the motions for admission *pro hac vice* to admit Gary R. Chopp, Melinda A. Davis, and Charles R. Tuffley be granted. It is, further,

ORDERED, That the joint motion for a stipulated protective order be denied. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

By: Christine M.T. Pirik
Attorney Examiner

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Entered in the Journal

MAY 24 2007

Reneé J. Jenkins
Secretary