FILE

FAX

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

THE INSURANCE COMPANY COMPLAINANTS' RESPONSE TO RESPONDENTS' MOTION TO CERTIFY INTERLOCUTORY APPEAL OF THE MAY 24, 2007 ENTRY DENYING RESPONDENTS' SECOND MOTION TO COMPEL

I. INTRODUCTION

From the moment discovery commenced in this matter, Respondents have (in essence) taken the position that the Commission is a court of law. As such, it can and should permit discovery on, and resolve, a myriad of issues (including mitigation of damages, comparative fault, measure of damages, etc.).

The Allianz Complainants (Case No. 05-1011) and the Lexington Complainants (Case No. 05-1012), collectively referred to as the "Insurance Company Complainants," have consistently advocated a narrower approach, one in keeping with Ohio Rev. Code §4905.26 and Ohio case law. See State ex. rel. Ohio Power Co. v Hamishfeger, 64 Ohio St.2d 9, 10, 412 N.E.2d 395, 396 (1980); Suleiman v Ohio Edison Co., 146 Ohio App.3d 41, 764 N.E.2d 1098

(Mahoning Cty. 2001). They contend that there are two, and only two, ultimate issues for the Commission to decide – 1) whether Respondents violated their duties to provide adequate services and/or facilities to its customers, and 2) whether such a violation was "a" (not necessarily "the" or "the primary") cause of the Blackout of 2003. All other issues will have to be resolved by an Ohio court at a later date.

This dispute came to a head in the context of Respondents' Second Motion to Compel Discovery. Respondents alleged they were entitled to discovery (interrogatory answers and/or the production of documents) regarding two types of information, neither of which have any relevance to the two aforementioned issues to be decided by the Commission. The first is information as to whether any of the Insurance Company Complainants' insureds had backup or emergency power generation systems in place at the time of the Blackout of 2003. The second are the various Insurance Company Complainants' underwriting files. In its May 24, 2007 Entry, the Commission (via the Attorney Examiner) correctly denied Respondents' Second Motion to Compel, recognizing the fallacy behind Respondents' position:

> It is critical, in considering the motion to compel discovery. . .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.

[May 24, 2007 Entry, ¶4(a)].

As was the case with the Commission's extension of the Procedural Schedule over Respondents' objections, Respondents simply will not take "no" for an answer. They now ask that the denial of their Second Motion to Compel Discovery be certified for interlocutory appeal to the Commission. Because most of Respondents' Motion is nothing more that a rehash of the meritless arguments they made in their Second Motion to Compel, the Insurance Company Complainants incorporate their Response to that Motion to Compel by reference here. However,

to make it clear why Respondents' request for Certification should be denied, the Insurance Company Complainants will summarize why the Attorney Examiner properly held that Respondents are not entitled to the discovery in question.

II. ARGUMENT

A. The Attorney Examiner Correctly Held That Respondents Are Not Entitled To Discovery Regarding Any Insured's Backup Or Emergency Generation Systems

As the Attorney Examiner properly observed in the May 24, 2007 Entry (something Respondents do not challenge in their current Motion), the key causation inquiry is what was a **cause of the power outage**, not what was a **cause of a particular insured's damages**. Whether a certain insured had backup or emergency power generation systems in place, and whether they functioned properly in response to the Blackout of 2003, has absolutely nothing to do with what caused the power outage.

Such information may be relevant as to a comparative negligence defense. This defense seeks to place some of the responsibility (certainly not all, as whoever caused the outage in the first place obviously must also be held responsible) for power outage-related damage on the insured itself because it did not have adequate backup systems in place. However, because this is a defense that even Respondents admit the Commission will not address in these limited proceedings, the information is not relevant or discoverable here.

Hoping to make this issue seem more complicated than it really is, in their Motion to Certify Respondents make two baseless assertions. First, as they unsuccessfully tried to do in their Second Motion to Compel, Respondents attempt to convert what is a comparative negligence defense into a "standing" argument. They begin with the assertion that in order to have standing "Complainants in inadequate service cases must establish an injury due to the

alleged inadequate service." [Respondents' Memorandum in Support, p. 1]. The implication is that evidence regarding an insured's damages, and the insured's own alleged role in causing them, is therefore relevant regarding standing. All of this is in total disregard of the Attorney Examiner's unchallenged finding that Ohio Rev. Code §4905.26 "does not require that complainants show damages in order to file a complaint with the Commission alleging inadequate service." [May 24, 2007 Entry, ¶4(a)].

Respondents also take a single phrase from a single document regarding the Republic Engineered Products claim totally out of context. They make a great deal over the fact that in an adjuster's report, it was observed that prior shut-downs and the Blackout of 2003 loss are "significantly intertwined from a loss adjustment perspective." [Respondents' Memorandum in Support, p. 4]. Even if true, this is an obvious reference to the fact that Republic's **damages** arising from the August 14, 2003 power outage and prior losses might overlap. This is hardly proof (as implied by Respondents) that Republic never lost power in August of 2003, or that if it lost power it was because its backup systems somehow interrupted an otherwise steady flow of power from Respondents.

Indeed, Respondents are being quite disingenuous, as they know full well the Blackout of 2003 did result in Republic **losing power**. Whether Republic's **resulting damages** are solely Respondents' fault, or whether Republic bears some responsibility as well, is an issue for a court to resolve at a later date.

In the end, Respondents' standing argument is simply illogical. The adequacy of an insured's backup generators, etc. would never have been tested **had it not been for the power outage in the first place**. Since Respondents are not arguing (nor can they argue) that a particular insured's back up power generation system **caused** the massive Blackout of 2003,

evidence regarding an insured's backup or emergency power generation systems has no relevance to the issues to be decided by the Commission. Therefore, their Second Motion to Compel was properly denied, and there is no need for interlocutory review by the Commission.

Respondents' other primary argument is that the Attorney Examiner's decision is a departure from past Commission precedent. This is absolutely untrue. In each of the cases they cite, the question was whether the respondent utility, or the complainant itself, was responsible **for the inadequacy in service** (neutral-to-earth voltage in Kohli, interruption in telephone service in Carpet Color Systems, or a power outage in Miami Wabash Paper). That issue is not before the Commission in this proceeding, as Respondents are not alleging that any of the Insurance Company Complainants' insureds caused the Blackout of 2003. As such, none of the cases Respondents cite are relevant.

What Respondents want is discovery regarding the question of whether they or a particular insured are responsible (or share responsibility) for that insured's **damages resulting from the inadequacy in service**. The Attorney Examiner held Respondents are not entitled to this discovery, as damage issues are beyond the scope of this proceeding. None of the cases cited by Respondents, nor any other decision of which the Insurance Company Complainants are aware, hold to the contrary. Therefore, there is absolutely no reason to disturb the May 24, 2007 Entry, or certify it for an interlocutory appeal.

B. The Attorney Examiner Correctly Held That Respondents Are Not Entitled To Discovery Regarding Any Of The Insurance Company Complainants' Underwriting Files

Respondents continue to assert that they need to review the Insurance Company Complainants' underwriting files in order to present their "volunteer" defense. As explained in the Insurance Company Complainants' Response to Respondents' Second Motion to Compel, the

resolution of Respondents' "volunteer" defense will require the examination and construction of one or more of the Insurance Company Complainants' policies. The Commission is not a court, and its role is not to resolve issues of insurance coverage. As such, the "volunteer" defense is one of many Respondents assert which will not (or should not) be addressed by the Commission, so any corresponding evidence is neither relevant nor discoverable here.

More important, whether any insurer "voluntarily" paid its insured's claim will depend solely on the language of the insurer's policy. As recognized by the Attorney Examiner, since Respondents have the relevant insurance policies, they should look to them as to whether an insurer was under a contractual duty to pay an insured's claim. [May 24, 2007 Entry, ¶4(b)]. There is no need for the underwriting files as well.

Indeed, in their Motion Respondents assert they need to investigate "whether any insured violated conditions or restrictions on coverage reflected in the underwriting files." [Respondents' Memorandum in Support, p. 7]. This reflects a fundamental misunderstanding of insurance law. Courts cannot go beyond the plain language of an insurance policy in order to determine whether there are conditions or restrictions on coverage. Pilkington North America, Inc. v Travelers Casualty & Surety Co., 112 Ohio St.3d 482, 487, 861 N.E.2d 121, 126 (2006); Costanzo v Nationwide Mutual Insurance Co., 161 Ohio. App.3d 759, 766-767, 832 N.E.2d 71, 77 (Hamilton Cty. 2005); Johnson v American Family Insurance, 160 Ohio. App.3d 392, 397, 827 N.E.2d 403, 407-408 (Lucas Cty. 2005). In other words, if there are restrictions on coverage, they must be in the body of the insurance policy itself.

The Attorney Examiner's holding regarding the Insurance Company Complainants' underwriting files is in keeping with controlling Ohio law and common sense. Consequently, there is no need for it to be the subject of interlocutory review by the Commission.

III. CONCLUSION

Accordingly, for the foregoing reasons, The Insurance Company Complainants respectfully request that Respondents' Motion to Certify Interlocutory Appeal be denied.

Respectfully submitted,

Christina L Pawlowski

Charles R. Tuffley, Esq. (admitted PHV)
Melinda A. Davis, Esq. (admitted PHV)
Alyssa J. Endelman, Esq. (admitted PHV)
Christina L. Pawlowski, Esq. (admitted PHV)
GROTEFELD & DENENBERG, L.L.C.
21 East Long Lake Road, Suite 200
Bloomfield Hills, MI 48304
(248) 549-3900

Attorneys for The Insurance Company Complainants
(Case Nos. 05-1011 and 05-1012)

Dated: June 4, 2007

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing The Insurance Company Complainants' Response to Respondents' Motion to Certify Interlocutory Appeal of the May 24, 2007 Entry Denying Respondents' Second Motion to Compel was mailed by ordinary U.S. mail to the following persons this 4th day of June, 2007:

David A. Kutik
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, OH 44114

Mark A Whitt
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215-5017

Edward Siegel
Attorney at Law
5910 Landerbrook Drive, #200
Cleveland, OH 44124

Craig Bashein
BASHEIN & BASHEIN CO. L.P.A.
50 Public Sq # 3500
Cleveland, OH 44113

Francis Sweeney, Jr.
Attorney at Law
323 Lakeside Avenue, Suite 450
Cleveland, OH 44113

Joel Levin
LEVIN & ASSOCIATES, CO., L.P.A.
The Tower at Erieview, Suite 1100
1301 East Ninth Street
Cleveland, OH 44114

Paul Flowers
PAUL W. FLOWERS CO., L.P.A.
50 Public Square
#3500
Cleveland, OH 44113

Gary D. Benz
First Energy Corp.
76 S. Main Street
Akron, OH 44308

Christina L Pawlowski
Christina L. Pawlowski

132217