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,	)	Case Nos. 04-28-EL-CSS
	)	05-803-EL-CSS
	)	05-1011-EL-CSS
	)	05-1012-EL-CSS
v.	)	
	)	
The Cleveland Electric Illuminating Company, Ohio Edison Company, Toledo Edison Company, and American Transmission Systems, Inc.,	)	
Respondents.	)	

REPLY MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO COMPEL DISCOVERY FROM THE LEXINGTON COMPLAINANTS (SIXTH MOTION) AND FROM THE ALLIANZ COMPLAINANTS (THIRD MOTION)

To state the obvious, it is common for parties in proceedings before the Commission to obtain discovery concerning documents prepared or relied upon by an opposing party's experts. Indeed, the Commission's Rules of Practice specifically provide for such discovery. Consistent with Commission rules and standard practice, Respondents requested Complainants to identify documents prepared or relied upon by Complainants' experts. Respondents also asked, consistent with Commission rules and practice, for Complainants to disclose the substance of their experts' opinions and the facts underlying those opinions. Further, Respondents asked for curriculum vitae of any witness that Complainants proposed to proffer as an expert.

Complainants refuse to do so, offering three reasons that indicate more about the attitude and diligence of Complainants in getting this case ready for hearing than about anything else. First, and most notably, Complainants claim that providing an explanation of their experts' opinions, the bases therefor and the documents that the experts reviewed and relied upon would be "burdensome and disruptive." (Complainants' Resp. at 3.)

If ever there were a time when it should *not* be burdensome for Complainants to provide the requested discovery, it is now. Complainants have known since late April 2007 (when the Attorney Examiner extended discovery at their request) that formal expert discovery would begin this month. (*See* Entry dated Apr. 30, 2007 at ¶ 12.) In *less than two weeks*, Complainants must provide summaries of their experts' testimony. (*Id.* at ¶ 12(b).) It stands to reason that Complainants already have something to summarize—namely, their experts' opinions and the factual bases for those opinions.

Moreover, these Complainants have been participating in this case for two years. They asked for and received a case schedule that allowed them to take fact discovery before the parties could begin expert discovery. They also asked for and received an extension of time to complete fact discovery (after wasting over three months by doing nothing and then realizing that fact discovery would be substantial). They have now taken over thirty depositions of current and former employees of Respondents or their affiliates. Surely, Complainants should know who their experts are and what they'll have to say by now. Remarkably, other than their bald contention that responding to the discovery at issue would be "burdensome," Complainants' opposition brief provides no clue regarding exactly why they couldn't respond.

Second, as noted in Respondents' memorandum in support, Complainants offer that the Scheduling Order somehow prevents Respondents from obtaining the discovery at issue. In fact,

Complainants specifically characterize the orders in these cases as allowing only expert summaries and depositions. (Complainants' Resp. at 2.) Nothing in the Scheduling Order precludes Respondents from obtaining expert discovery prior to the deadline for testimony summaries. Complainants' resistance to expert discovery appears to stem from a misreading of the Scheduling Order. The Scheduling Order requires the parties to identify experts and to provide summaries of expert testimony. Contrary to Complainants' characterization, and consistent with Rules 4901-1-16(C) of the Rules of Practice (authorizing discovery of expert opinions and underlying facts), 4901-1-19 ("Interrogatories and response time") and 4901-1-20 ("Production of documents and things"), the Order also *expressly* contemplates written expert discovery:

> Monday November 19, 2007 (formerly, Friday August 31, 2007): All responses to requests for *written discovery* and all depositions related to expert testimony shall be completed.

(Entry dated Apr. 30, 2007 at ¶ 12(e) (emphasis added); *see* Entry dated Oct. 26, 2006 at ¶ 8 (original scheduling order, setting prior "written discovery" deadline).) There is only one way Complainants could have arrived at their understanding of the procedure for expert discovery in this case, and that is to ignore both Commission discovery rules and the clear language of the Scheduling Order. Complainants' imagined restrictions on that process should be rejected.

Third, Complainants assert that Respondents agreed to Complainants' imagined discovery process. Complainants argue that, by referring to the Scheduling Order in response to expert discovery requests, Respondents indicated that they shared Complainants' understanding that such discovery was limited to summaries and depositions. As described above, the Scheduling Order provides no such limitation. Moreover, by their answer, Respondents merely objected to the timing of those requests, not to their form. Notably, Complainants' written discovery regarding experts supports Respondents' position and belies Complainants' attempt to

change the rules of expert discovery. Complainants propounded their written expert discovery requests (which were nearly identical to the requests at issue) on January 26, 2007—three months after the original Scheduling Order allegedly "preempted" written expert discovery. (*See* Complainants' Interrog. No. 21, dated Jan. 26, 2007, attached as Exhibit A.)

The purpose of expert discovery is to allow each party to thoroughly review adverse parties' experts' opinions. Expert discovery should eventually clarify the parties' respective positions at hearing. Complainants' novel theory of expert discovery should be rejected not only because it is contrary to the Scheduling Order and Commission rules, but because it would result in confusion rather than clarity. Respondents' experts cannot adequately prepare their opinions, which must respond to Complainants' case, unless Complainants have themselves provided meaningful disclosure of their experts' opinions. Respondents are entitled to the actual opinions, not mere "summaries." Respondents also cannot effectively question Complainants' experts about their opinions if Respondents must first spend hours in deposition trying to figure out what those opinions are. A party cannot effectively prepare to cross examine an expert without advance disclosure of the expert's opinions.

Given the utter flaccidity of Complainants' arguments, it appears that their attempt to avoid expert discovery is motivated by one of two things: (1) despite all of the time and discovery that Complainants have had, they are *still* not ready to move forward with this case; or (2) they simply intend to "hide the ball" and force Respondents to make due with minimal disclosures before the filing of testimony. Neither justifies denying Respondents' motion. The Commission should not reward conduct that either is grossly dilatory or is at odds with the spirit and intent of the Commission's rules and practices.[1]

[1] Complainants make a comment about the supposed motivation of Respondents in filing this motion. Specifically, they contend that the motion was only filed to force Complainants somehow to agree to a proposal made by Respondents to file staggered testimony (i.e., to have the Complainants file testimony, followed by

If there is to be meaningful expert discovery in this case, it should be conducted in accordance with Commission rules and the Scheduling Order, both of which require that Complainants provide complete answers to Respondents' Interrogatory No. 9 and Request for Production Nos. 1 and 3. For these reasons, Respondents respectfully request that the Attorney Examiner grant Respondents' Motion to Compel.

(continued...)

Respondents' testimony, followed in turn by Complainants' rebuttal testimony (if any)). (*See* Complainants' Resp. at 2.)

While the notion of filing staggered testimony has merit (and one that Respondents intend to pursue with the Attorney Examiners in due course), the specific proposal that was made attempted to deal with (a) a comment made by Complainants' counsel that he didn't think that Complainants could be ready by August 15 to provide full disclosure about their experts; and (b) Respondents' desire to have full disclosure from Complainants about their experts before Respondents provided similar reciprocal disclosure. The proposal called for the parties to delay any expert discovery until Complainants filed their testimony. After that testimony was filed, Respondents would take discovery and then file their expert testimony, which would be followed by a period of discovery by Complainants and then the filing of any expert rebuttal testimony. Once Complainants' counsel rejected that proposal, Respondents merely reminded Complainants of their obligation to supplement their discovery responses regarding experts, as required by the Commission's rules. (*See* Rule 4901-1-16(D)(1); Letter from D. Kutik to C. Tuffley dated July 17, 2007; Letter from C. Tuffley to D. Kutik dated July 24, 2007; Letter from D. Kutik to C. Tuffley dated July 24, 2007 (letters attached to Exhibit A to Memo. in Support as Exhibits MAW-4, MAW-5 and MAW-6 respectively).)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply in Support of Respondents' Motion to Compel Discovery was served by facsimile (without exhibits) and U.S. Mail (with exhibits) to the following persons this 6th day of August, 2007.

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EXHIBIT A

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaints of S.G. Foods, Inc., et al.; Miles Management Corp., et al.; Allianz US Global Risk Insurance Company, et al.; Lexington Insurance Company, et al.; and BMW Pizza, Inc. and DPNY, Inc., 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.	)	05-1014-EL-CSS
Respondents.	)	

COMPLAINANTS' INTERROGATORIES TO RESPONDENT THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

Pursuant to Rules 4901-1-16, 4901-1-19 and 4901-20 of the Ohio Administrative Code, Complainants Allianz US Global Risk Insurance Company, et al and Lexington Insurance Company, et al request Respondent The Cleveland Electric Illuminating Company, Inc. to respond in writing and under oat to the following interrogatories; to produce or make available for inspection and copying documents responsive to the following requests for production; and to serve written responses to the interrogatories and requests for production within twenty (20) days. These interrogatories and requests for production of documents are governed by the following Instructions and Definitions:

21. For each and every expert you plan to use during the trial of this cause, please state:

a. The subject matter about which each expert is expected to testify;

b. The substances of the facts and opinions to which each expert is expected to testify;

c. A summary of the grounds for each such opinion; and

d. A description and the qualification of each such expert.

ANSWER:

22. Did this Respondent or anyone acting on your behalf, make an investigation as to the August 14, 2003 Outage which is the subject matter of this litigation; if so, for each such investigation, state:

a. The date the investigation was performed;

b. The name, address and job title of the person who conducted the investigation;

c. A description of the investigation; and

d. Identify all documents which relate to and/or evidence each such investigation and the results thereof.

ANSWER:

28. Did this Respondent notify the neighboring system of its emergency operating conditions prior to and during the August 14, 2003 Outage. If so, please describe in detail the steps taken by FirstEnergy Respondents.

ANSWER:

Respectfully submitted,

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Dated: January 26, 2007