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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
The Cleveland Electric Illuminating Company, Ohio Edison Company, Toledo Edison Company, and American Transmission Systems, Inc.,	)		05-1011-EL-CSS
	)		05-1012-EL-CSS
Respondents.	)		

ENTRY

The attorney examiner finds:

(1) 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 a widespread blackout on August 14, 2003, thereby causing financial harm to the complainants. The complainants in Case No. 05-1011-EL-CSS will be referred to as the Allianz complainants and the complainants in Case No. 05-1012-EL-CSS will be referred to as the Lexington complainants.

(2) On October 25, 2006, the examiner held a telephonic prehearing conference, at which the parties discussed the schedule for discovery and the hearing in these consolidated cases. The examiner is-

sued an entry on October 26, 2006, setting forth the schedule determined at that conference.

(3) By examiner entry of April 30, 2007, the schedule was delayed, with new deadlines established. The substance of the schedule set forth in the October 26, 2006, entry was not otherwise altered. The October 26, 2006, and April 30, 2007, entries may be referred to herein as the scheduling orders.

(4) On July 27, 2007, the respondents filed their Fifth Motion to Compel Discovery from the Lexington Complainants. This motion will be referred to herein as the fifth motion. The Lexington complainants filed a response, in the nature of a memorandum contra the fifth motion, on August 1, 2007. Respondents replied on August 3, 2007.

(5) On August 2, 2007, the respondents filed their Motion to Compel Discovery from the Lexington Complainants (Sixth Motion) and from the Allianz Complainants (Third Motion). This motion will be referred to herein as the sixth motion. The Lexington and Allianz complainants filed a response, in the nature of a memorandum contra the sixth motion, on August 6, 2007. Respondents replied later on that same day.

(6) The fifth motion and the sixth motion will be considered sequentially in this entry.

(7) In the fifth motion, the respondents seek an order compelling the Lexington complainants to produce, for deposition, representatives to testify regarding the identity and customer status of insureds to whom they paid outage-related claims, the contents of the claim files produced by the complainants and facts underlying those claims, and the insurance policy providing coverage for each outage-related loss. As background, they allege that, upon receipt of notice of such depositions, the Lexington complainants refused to produce individuals for deposition on these matters.

(8) The respondents argue that, in order to establish standing, the Lexington complainants will have to present evidence at the hearing, authenticating the necessary documents. The respondents assert that they "are entitled to know before the hearing which documents Complainants believe establish Complainants' standing and why. Respondents are also entitled to know what Complainants

have to say about such materials." (Memorandum in support of fifth motion, at 2-3.)

(9) In their response, the Lexington complainants break the issue into the five deposition topics proposed by the respondents. First, with regard to the insureds' identities, they assert the information is available in the previously provided claim files. Second, with regard to insurance policy terms, they also state that the policies themselves have already been provided and contend that this is an effort to delve into the question of whether the claims were "voluntarily" paid and, thus, that it goes to the question of damages. Third, with regard to the facts underlying each insured's claims, including investigation of those claims, the Lexington complainants argue that the claim files do not contain information relating to the cause of the outage and are, therefore, not pertinent. Fourth, with regard to the contents of each insured's claim file, the Lexington complainants state that the files have already been produced. Fifth, with regard to facts underlying claims that each insured was a customer of respondents at the time of the blackout, they assert that the issue of customer status has been resolved and additional discovery is not required. They contend that "claim files essentially 'speak for themselves.'" Finally, while the Lexington complainants agree that they will have to provide testimony at the hearing to authenticate appropriate documents, they suggest that "absolutely no purpose will be served by requiring this testimony to first come out during a deposition."

(10) In their reply, noting the complainants' admission that authenticating testimony will be necessary, the respondents submit that they "are entitled to know what these witnesses will say *before* they testify at hearing." They assert that these questions have nothing to do with damages but, rather, relate to the fundamental question of standing.

(11) The respondents' fifth motion to compel will be granted. In the first, second, fourth, and fifth proposed deposition topics, as so identified by the Lexington complainants, the underlying documentation has already been provided to the respondents. No rule or entry would prohibit the respondents' taking depositions with regard to the authentication of these documents or with regard to other questions that the respondents may have regarding this material. The third topic relates to claim files. In this area, the Lexington complainants quote a prior attorney examiner entry in which

the examiner contrasted the causation of damage and the causation of the outage. The Lexington complainants attempt to argue that, because the claim files do not contain information concerning the causation of the blackout, they are not relevant. However, they fail to note that the examiner's statement was made in the context of an assertion by the respondents that backup facilities had played a role in causing the insureds' damage. Here, on the other hand, the respondents are seeking to inquire into the issue of the complainants' standing. Neither causation of damage nor causation of the outage is relevant to this foundation issue. The quoted language is therefore not relevant to the present motion. Depositions relating to the facts underlying the claims are appropriate.

(12) The respondents noticed the depositions that underlie the fifth motion on June 26, 2007. Although the current procedural schedule in these proceedings requires fact discovery, such as the depositions called for in the fifth motion, to be complete by July 13, 2007, it is clear that the Lexington complainants' refusal to produce individuals for deposition has caused this discovery not to be completed by the scheduled deadline. Therefore, the examiners will allow these depositions to occur beyond the established deadline. They should be scheduled as soon as reasonably possible.

(13) In the sixth motion, the respondents seek an order compelling the Lexington and Allianz complainants to provide complete responses to discovery regarding expert witnesses. As background to this motion, the respondents explain that, on September 29, 2006, they propounded an interrogatory asking for information concerning experts that the Lexington and Allianz complainants intend to call, including the substance of their opinions, facts on which the opinions would be based, a summary of the experts' background and qualifications, documents supplied to, reviewed by, relied on, or prepared by the experts, and information regarding other cases in which the experts have testified. The respondents also asked for the production of documents identified in the interrogatory and experts' *curricula vitae*. The respondents continued, noting that the complainants' initial response, in January and February 2007, was that they had not yet determined who they would call as an expert and would "identify their experts in accordance with the Commission's Order." The respondents assert that the Lexington and Allianz complainants have again refused to respond to these requests, on the basis that the examiners' schedule preempts the expert interrogatories.

(14) The respondents contend that the information they request is relevant and discoverable and that nothing about the scheduling orders limit the scope of permissible discovery. Further, they suggest that the scheduling orders merely establish deadlines and minimums, therefore not preempting discovery requests.

(15) The Lexington and Allianz complainants claim that the scheduling orders set out the process for conducting expert discovery and that the process calls for only the filing of summaries of experts' opinions and the deposition of experts. The Lexington and Allianz complainants further state that the respondents never indicated that they also would want expert discovery through interrogatories or requests for production. These complainants also contend that the respondents ask that the filing of expert summaries *[sic]* be staggered. Finally, they note they the respondents have also responded to an interrogatory by stating that they would disclose their experts and opinions in accordance with the scheduling order.

(16) In reply, the respondents discuss the arguments in three categories. The first category relates to the timing of explaining the experts' opinions, the bases therefor, and the documents reviewed and relied upon. The respondents suggest that, since summaries of expert testimony must be provided by August 15, 2007, it is reasonable to assume that the complainants already know enough about the experts and their opinions to be in a position to reply to the discovery at issue. The second category relates to the complainants' assertion that the scheduling orders prevent respondents from obtaining answers to this discovery and that the orders only allow expert summaries and depositions. The respondents point out that the orders expressly contemplate written expert discovery, as to the Commission's procedural rules. In the third and final category, the respondents explain that, by referring to the scheduling order in their response to an interrogatory, they merely objected to the timing of that interrogatory.

(17) The respondents continue, in their reply, with a discussion of the purpose for expert discovery, claiming that it allows parties to review experts' opinion thoroughly and to clarify the parties' respective positions. They assert that their "experts cannot adequately prepare their opinions, which must respond to Complainants' case, unless Complainants have themselves provided meaningful disclosure of the experts' opinions." They profess that they "are entitled to the actual opinions, not mere 'summaries.'"

(18) The sixth motion will be granted. Several issues merit discussion, however. First, the examiners would note that nothing in the scheduling orders can be read to prohibit discovery regarding experts prior to the established deadlines. Clearly, the parties must be making efforts to locate appropriate experts and to assist those experts in reaching opinions. Once discovery has been propounded, even if the responding party had no answer at that time, supplements are required as additional information becomes known. Rule 4901-1-16(D), Ohio Administrative Code (O.A.C.). Therefore, to the extent that the Lexington and Allianz complainants now have answers to the interrogatories and requests for production of documents regarding experts, those answers should be supplied to the respondents. Similarly, if the respondents now have an answer to an interrogatory relating to their experts, that answer should be supplied to the complainants.

(19) The parties also appear to disagree as to what information is covered by the term "a description of the testimony," as used in the April 30, 2007, scheduling order. Reference should be made to the October 26, 2006, scheduling order, in which more details were included. There, the examiner stated that "the complainants shall also submit . . . a document prepared by each such expert, setting forth the substance of testimony anticipated from that expert . . .." Clearly, this is neither the expert's complete opinion nor a brief statement of topics to be covered. The examiners expect the "testimony descriptions" to be as detailed as is reasonably possible, understanding that continuing discovery that will assist in the development of expert opinions and that testimony preparation is ongoing.

(20) The Lexington and Allianz complainants assert, in their response to the sixth motion, that discovery following the filing of testimony descriptions will be limited to depositions. This is clearly not the case. As noted by the respondents, the scheduling orders, both originally and as amended, specifically reference written expert discovery. The original scheduling order makes the issue very clear, stating the date on which "[a]ll responses to requests for written discovery related to expert testimony, as well as all depositions related to expert testimony, shall be completed . . .."

(21) The final issue relates to the overall procedure for the expert phase of the discovery and testimony preparation phase of the schedule. The examiners note that the parties have engaged in some commu-

nications regarding the content of testimony descriptions, the deposition of experts, and the preparation of final testimony. The respondents' sixth motion includes, as an attachment, a letter in which they proposed delaying expert discovery until after the filing of testimony and that testimony filing dates be moved forward and staggered. Expert discovery, according to the proposal laid out in that letter, would follow the filing of testimony and would result in the filing of rebuttal testimony by complainants. The Lexington and Allianz complainants' response, rejecting the proposal, is based on their belief that the testimony descriptions will include meaningful information and will allow the respondents to depose the experts and to offer responsive opinions. In response to this position, the respondents comment, in a footnote in their reply, that they intend to pursue the filing of staggered testimony with the examiners "in due course."

(22) The examiners recognize that the current schedule is substantially different than the typical procedure followed in practice before the Commission. It resulted from a prehearing conference, held early in the hearing preparation process, with counsel for all parties then a part of these consolidated proceedings, some of whom are no longer participating in the litigation. The examiners also recognize that the testimony descriptions may not provide the level of detail regarding experts' opinions that is necessary for adequate hearing preparation. Typically, there is a period of time, following the filing of actual testimony, during which additional depositions can be taken. It is atypical in this type of proceeding, however, to file rebuttal testimony prior to the hearing, as was proposed by the respondents in their letter. Rebuttal testimony, if appropriate, would be filed after the conclusion of both parties' cases in chief. Based on that recognition, the examiners are receptive to a motion for schedule and procedure modifications that may assist the parties in preparing adequately for the hearing. Such a motion should not be delayed, however, in light of the current stage of the process. The examiners would note, additionally, that the hearing date will not be moved. Finally, the examiners would encourage all of the parties in this consolidated proceeding to work together to develop a proposal that is mutually satisfactory and to submit it as a joint motion. Although a proposed process should not include the filing of rebuttal testimony prior to the hearing, the parties could consider allowing for the filing of supplemental testimony after final expert depositions. The parties should keep in mind that all testimony must be filed in sufficient time to allow the examiners to review it

prior to the start of the hearing and that all depositions, if they are to be used in the hearing, must be on file with the Commission. Rule 4901-1-21(N), O.A.C.

It is, therefore,

ORDERED, That the respondents' fifth and sixth motions to compel be granted. It is, further,

ORDERED, That the scheduling modification discussed in finding 12 be followed. It is, further,

ORDERED, That the parties work together to develop an appropriate further scheduling modification proposal, as discussed in finding 22. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

By: Jeanne W. Kingery
Attorney Examiner

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Entered in the Journal

AUG 10 2007

Reneé J. Jenkins
Secretary