

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.)

The Cleveland Electric Illuminating)
 Company, Ohio Edison Company, Toledo)
 Edison Company, and American)
 Transmission Systems, Inc.,)

Respondents.)

Case Nos. 04-28-EL-CSS

05-803-EL-CSS


05-1011-EL-CSS

05-1012-EL-CSS

ENTRY

The attorney examiner finds:

- (1) The complainants in these consolidated proceedings (collectively, the complainants) 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.
- (2) By entry issued September 28, 2007, the attorney examiners established a revised procedural schedule in these dockets. In that entry, the attorney examiners required, *inter alia*, that the respondents file their expert testimony summaries two weeks after the completion of Dr. Shahidehpour's deposition, which was to be completed by October 12, 2007. On October 25, 2007, the attorney for the respondents contacted the attorney

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examiners requesting that the summaries be served upon the parties and not actually filed at the Commission. In light of the fact that the two-week deadline for the filing of the summaries expired on October 26, 2007, the attorney examiners instructed the respondents to serve the summaries on the parties, not file the summaries, and file an appropriate motion stating their request in these dockets.

- (3) On October 26, 2007, the respondents filed a motion seeking a minor modification to the September 28, 2007, scheduling entry, requesting that they be permitted to serve their expert summaries on the parties, and asking that they not be required to file the summaries. In support of their motion, respondents state that the summaries total several hundred pages and contain a substantial amount of confidential information, including critical energy infrastructure information. The respondents submit that the expert summaries are not evidence and are merely a discovery tool designed to assist the parties in preparing their cases. Therefore, the respondents reason that there is no cause to burden the Commission with a review of confidential expert summaries which do not contain substantive evidence. No one filed in opposition to respondents' motion.
- (4) Upon consideration of the respondents' motion filed on October 26, 2007, the attorney examiner finds that it is well made and should be granted.
- (5) According to the schedule ordered by the examiner on September 19, 2007, the complainants were required to file, no later than October 30, 2007, "all non-expert written testimony and all designations of those portions of any depositions that they intend to introduce at hearing." On October 30, 2007, the complainants in Case Nos. 05-1011-EL-CSS and 05-1012-EL-CSS (insurance complainants) filed several sets of testimony and numerous depositions.
- (6) As the examiner stated in the September 19, 2007, entry, by adopting a date for the filing of depositions that the complainants intend to introduce at hearing, the examiner was not ruling on admissibility of the depositions. The parties should keep in mind that Rule 4901-1-21(N), Ohio Administrative Code (O.A.C.), provides that "[d]epositions

may be used in commission hearings to the same extent permitted in civil actions in courts of record." Civil Rule 32(A) sets forth the circumstances under which depositions may be used. The burden of showing the existence of one of the enumerated circumstances is on the party seeking to use a deposition.

- (7) By entry issued October 16, 2007, in recognition that the parties might request confidential treatment of some of the documents filed and/or presented at the hearing, the attorney examiners established a process for the parties to follow when requesting confidential treatment. The entry required, *inter alia*, that, if a party alleges that specific information contained in testimony, exhibits, and documents that must be filed prior to the hearing in these cases is confidential, the party shall accompany the filing with a motion for a protective order in accordance with Rule 4901-1-24, O.A.C.
- (8) The depositions filed by the insurance complainants on October 30, 2007, were accompanied by a letter stating that "the [r]espondents have designated these depositions and exhibits as 'confidential'." In contravention of the attorney examiner's October 16, 2007, entry, there was no motion for protective order accompanying this filing. Therefore, the examiners find it necessary to reemphasize and clarify the process for the filing of alleged confidential information.
 - (a) When a party makes a filing, if there is information contained in the filing that the filing party wishes to be kept confidential, the filing party must file an unredacted copy, along with a motion for protective order requesting that it be maintained under seal at the Commission. This is the process, regardless of whether the information is deemed confidential by the filing party or whether a confidentiality agreement that the party has executed requires the party to treat it confidentially.
 - (b) The motion for a protective order shall be accompanied by a memorandum in support. If the information sought to be protected is information that the filing party itself deems

confidential, then the supportive memorandum must set forth the specific reasons why the party deems it confidential, citing to applicable statutes and rules and applying those statutes and rules to the types of information sought to be protected. On the other hand, if the information sought to be protected is information that an opposing party deems confidential and was obtained by the filing party under the terms of a confidentiality agreement, then the filing party's supportive memorandum shall so state. Then, within four business days after such filing, the opposing party (who deems the information to be confidential) shall file a memorandum in support, setting forth the specific reasons why the party deems it confidential, citing to applicable statutes and rules and applying those statutes and rules to the information sought to be protected.

- (9) With regard to redaction of documents filed with motions for protective orders, the parties should keep in mind that the Commission is obligated to keep as much information in the open record as possible. Section 4905.07, Revised Code, provides that all facts and information in the possession of the Commission shall be public, except as provided in Section 149.43, Revised Code, and as consistent with the purpose of Title 49 of the Revised Code. Section 149.43, Revised Code, specifies that the term "public records" excludes information which, under state or federal law, may not be released. Rule 4901-1-24, O.A.C., allows the Commission to issue an order to protect the confidentiality of information contained in a filed document, under specified circumstances. Rule 4901-1-24(D)(1), O.A.C., also provides that, where confidential material can be reasonably redacted from a document without rendering the remaining document incomprehensible or of little meaning, redaction should be ordered rather than wholesale removal of the document from public scrutiny.
- (10) Therefore, when motions for protective orders are filed, the Commission must be provided with proposed redacted versions. Where the movant is seeking to protect its own information, the movant should supply proposed redactions at the time it files the motion. On the other hand, if the movant is

seeking to protect information it obtained from the opposing party pursuant to a confidentiality agreement, then the opposing party should supply proposed redactions at the time it files its supportive memorandum. If the examiners disagree with the proposed redactions, then they may order modification of those redactions. If the examiners have previously ruled on a protective order for the same type of information as is being sought to be protected, then the redactions shall be proposed in accordance with the prior ruling.

- (11) With regard to the insurance complainants' October 30, 2007, filing, no redacted version of the documents has been filed, as was required by Rule 4901-1-24(D)(1), O.A.C. However, as the examiners have not yet ruled in these cases on a protective order, the examiners will allow the redaction to be postponed until after such ruling. Therefore, the complainants shall file, within seven business days, a motion for a protective order, covering all depositions filed confidentially on October 30, 2007, together with a memorandum in support. If applicable, respondents shall also file a memorandum in support within seven business days. Redaction, if appropriate and necessary, may be ordered by entry.
- (12) Coincident with the issuance of this entry, the attorney examiner is issuing an entry in these cases and in *In the Matter of the Expansion of the Electronic Filing Pilot Project and Waiver of Procedural Rules 4901-1-02 through 4901-1-04, Ohio Administrative Code*, Case No. 06-900-AU-WVR (06-900). In 06-900, the Commission expanded its initiative to permit electronic filing via the internet (e-filing) using the Commission's Docketing Information System (DIS). In the companion entry issued today, the examiner is finding that, in anticipation of the large number of documents that will be filed in these cases, it is prudent to encourage the parties, if they have the capabilities, to e-file future documents. Participation in the e-filing program will assist the Commission's Docketing Division, will result in more expeditious posting of materials on the Commission's website, and will reduce copying and delivery expenses.
- (13) In further recognition of the magnitude of anticipated filings in these matters, the following should be observed by the parties:

- (a) If feasible, all paper copies either filed or provided to the examiners should be two-sided.
- (b) If a party participates in the e-filing program, for all e-filed documents:
 - (i) One paper copy must be filed with the Commission's Docketing Division in accordance with the companion entry issued today in these cases and 06-900.
 - (ii) Two paper copies must be provided to the examiners no later than the next business day after the document is e-filed.
 - (iii) Paper copies must be provided to all parties who are not participating in the e-filing program no later than the next business day after the document is e-filed.
- (c) If a party does not participate in the e-filing program, that party must file one original and three copies of all documents to be filed in these proceedings. This requirement shall be deemed, for these proceedings, as compliance with Rule 4901-1-02(C), O.A.C.
- (d) With regard to confidential documents, the filing requirements in Rule 4901-1-24, O.A.C., shall continue to apply. The parties should take note that confidential documents may not be e-filed.

It is, therefore,

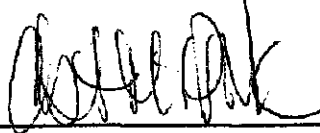
ORDERED, That the respondents' motion to modify the September 28, 2007, entry be granted. It is, further,

ORDERED, That the parties adhere to the processes set forth in this entry concerning the use of depositions and requests for protective orders. It is, further,

ORDERED, That the parties observe the processes and number of copies to be filed or provided, as set forth in this entry. 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

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Renee J. Jenkins
Secretary