

# JONES DAY

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November 15, 2007

VIA HAND DELIVERY

Ms. Renee J. Jenkins  
Director of Administration  
Docketing Department  
The Public Utilities Commission of Ohio  
180 East Broad Street, 13th Floor  
Columbus, OH 43215

RECEIVED-DOCKETING DIV  
2007 NOV 15 AM 11:27  
PUCO

Re: S.G. Foods, Inc., et al. v. The Cleveland Elec. Illum. Co., et al.,  
PUCO Case Nos. 04-28-EL-CSS, etc. (Consol.)

Dear Ms. Jenkins:

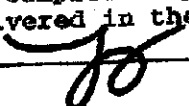
Enclosed is a copy of the Motion to Strike Complainants' Filing of Depositions and Motion for Protective order filed yesterday, November 14, 2007, on e-docket. We are filing a hard copy pursuant to the Attorney Examiner's November 2, 2007 Entry in this proceeding. Hard copies are also being delivered to the Attorney Examiners assigned to the case and parties of record.

Sincerely,  


Mark A. Whitt

Enclosure

cc: Jeanne Kingery, Esq. (w/enc. (2))  
Christine Pirik, Esq. (w/enc. (2))

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business  
technician  Date Processed 11-15-07

COI-1386927v1

**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
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.	)	

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**MOTION TO STRIKE COMPLAINANTS' FILING OF DEPOSITIONS AND MOTION FOR PROTECTIVE ORDER**

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Respondents Ohio Edison Company ("Ohio Edison"), The Cleveland Electric Illuminating Company ("CEI"), Toledo Edison Company ("Toledo Edison") and American Transmission Systems, Inc. ("ATSI") (collectively, "Respondents") respectfully move for an Entry: (1) striking from the record the depositions filed and subsequent motion for protective order filed by the Complainants in Case Nos. 05-1011 and 05-1012; (2) ordering Complainants to retrieve those materials; and (3) precluding Complainants from offering any deposition testimony except for purposes of impeachment.

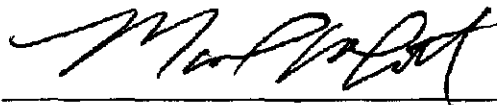
Complainants have failed to follow the Attorney Examiners' order regarding deposition designations and the proper procedures for designating confidential information. As a result, Complainants' filing of depositions in lieu of filing designations of portions of depositions is

grossly overbroad and will ultimately unnecessarily require Respondents and the Attorney Examiners to review mounds of irrelevant material for confidentiality, relevance and admissibility.

Because of Complainants' continued noncompliance with the Commission's orders and to avoid unnecessary burdens to Respondents and the Attorney Examiners, Respondents respectfully request that this Motion be granted.

November 14, 2007

Respectfully submitted,



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Attorneys for Respondents

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

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**MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO STRIKE  
COMPLAINANTS' DESIGNATION OF DEPOSITION TESTIMONY  
AND MOTION FOR PROTECTIVE ORDER**

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**I. STATEMENT OF THE CASE**

The Scheduling Order requires that by October 30, 2007:

Complainants shall file all non-expert written testimony and all designations of those portions of any depositions that they intend to introduce at hearing.

(Entry dated Sept. 28, 2007 at ¶ 2.)

The Scheduling Order plainly contemplates that Complainants would identify specific portions of specific depositions. The purpose of the designation was unmistakable: designating portions of depositions intended to be offered by Complainants would enable the parties and the Commission to make determinations of relevance, admissibility and potential confidentiality of

material that will actually be proffered at hearing. But rather than taking the time and effort to disclose exactly what they intend to use at hearing, Complainants simply filed most of the depositions of Respondents' present and former employees that Complainants took in this case, together with all of the exhibits used in these depositions.<sup>1</sup> This filing was accompanied by a letter stating that the depositions are confidential, but Complainants did not include a motion for protective order as required by the Entry of October 16, 2007. (See Entry dated Nov. 2, 2007 at ¶ 8.)

Complainants' failure to follow proper procedures for filing confidential material required the Attorney Examiners to issue yet another Entry, dated November 2, 2007, spelling out yet again the procedures to be followed in filing material containing confidential information. The November 2 Entry instructs that where a filing contains confidential information, the party filing the material is required to submit redacted and unredacted copies of the filing, along with a motion for protective order. "[I]f 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." (Entry dated Nov. 2, 2007 at ¶ 10.)<sup>2</sup> The November 2 Entry directed Complainants to file a motion for protective order and memorandum in support within seven business days., and for Respondents to also file a memorandum in support "if applicable." (See *id.* at ¶ 11.)

Complainants filed a motion for protective order covering the depositions filed on October 30, but they still have failed to properly designate the "portions of any depositions that

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<sup>1</sup> Based on the fact that Complainants' October 30, 2007 filing was designated confidential and is not reflected on e-docket, it is Respondents' understanding that these materials are not yet part of the public record, and will not become part of the record until the Attorney Examiners resolve the outstanding confidentiality issues.

<sup>2</sup> Despite the admonition in the November 2 Entry instructing the parties not to make blanket designations of confidentiality, Complainants did just that in their November 9, 2007 expert testimony filing.

they intend to introduce at hearing.” Complainant’s disregard of the Scheduling Order foists an extremely burdensome and unnecessary task on the Respondents and the Attorney Examiners.

## II. ARGUMENT

The root of the problem with the Complainants’ filing lies in Complainants’ disregard of the Scheduling Order. Complainants were instructed to file by October 30 “all designations of those *portions* of any depositions that they intend to introduce at hearing.” (Entry dated Sept. 28, 2007 at ¶ 2 (emphasis added).) The purpose of this requirement was to put Respondents on fair notice as to what portions of depositions were at issue so that Respondents could prepare responsive testimony, prepare objections to any portions of that testimony and designate specifically what portions of that testimony (and exhibits) proposed to be offered should be afforded confidential treatment. But rather than review the depositions and make *any* selective disclosure of what will be part of their direct case, Complainants filed 33 depositions, leaving Respondents (and the Attorney Examiners) to guess at what portions of these depositions Complainants actually intend to use. This kind of gamesmanship obscures the issues for hearing at a time when they should be clear.

In addition to being contrary to the obvious intent behind the requirement to file deposition designations, Complainants’ blanket filing creates needless work. As things now stand, Respondents must review over 4,200 pages of testimony. Much (possibly most) of this material is irrelevant in these proceedings. For example, the deposition of William Spidle, a control room dispatcher on duty on August 14, 2003, contains an *ad nauseam* history of the witness’s employment history with the former CAPCO companies in the 1970s and 80s, including testimony about what the CAPCO companies were. (Spidle Dep. at 20-41.) Do Complainants really intend to bother the Commission with evidence on the existence and organization of the CAPCO companies? Similarly, the first sixty pages of the deposition

transcript of Mark Julian, the Vice President of Energy Delivery for FirstEnergy Services Company, discuss his employment history dating back to 1980. (Julian Dep. at 1-62.) In fact, it isn't until page 64 that Mr. Julian was asked about his job responsibilities in the 2003 timeframe. Does anyone really care who supervised Mr. Julian in 1980, what sort of things were contained in a "job packet" he received on a day-to-day basis as an Engineer B, and whether his field crew leader was union or non-union?

Given Complainant's recent filing of their "expert" testimony, it appears that many issues relating to confidential information discussed in depositions will no longer be part of the case. A comparison of the summaries of the opinions of these "experts," filed on August 24, and their recently filed testimony shows that many issues raised in the summaries have been abandoned. In light of this apparent narrowing of the issues in this case, Complainants' attempt to require Respondents to review all 4200 pages of deposition testimony is particularly unfair and *inappropriate*.

Complainants' omnibus filing also will require Respondents to review every exhibit filed with each of these depositions. As with the testimony, Complainants give no clue as to which exhibits they actually intend to introduce at hearing.

Simply put, Respondents should not be forced to undertake such a review of all 33 depositions and a waist-high pile of exhibits in light of Complainants' failure to designate specifically what they intended to use at hearing. Likewise, it makes little sense for the Attorney Examiners to referee disputes about whether certain information is entitled to confidential treatment where Complainants offer no clue about what they really intend to introduce at hearing.

This is not the first time that these Complainants have tried to skate by with attempting to do as little as possible. They waited until the original discovery period was almost half over

before beginning to do any discovery. They delayed responding to Respondents' discovery for months before being ordered to do so. They had to be ordered to comply with the Commission's orders regarding expert discovery to produce "experts" for deposition and to respond otherwise to Respondents' discovery regarding these witnesses. They negotiated the Scheduling Order in bad faith, only to require the Attorney Examiners to decide upon and issue a schedule for this case which would allow Respondents a fair opportunity to understand Complainants' case and to prepare for the expeditious hearing of the evidence in this matter. Enough is enough.

Complainants, having wasted the fair opportunity given them, should now be forced to live with the consequences of conduct that is dilatory or overly tactical, or both. If Complainants are either so unprepared or so committed to their game-playing tactics, then they should not be permitted either to hide the ball about their real intentions or lard the record with mounds of irrelevant evidence.

The only fair remedy is for the Commission to strike the filing of these depositions (and the delayed motion for protective order) and preclude Complainants from offering any deposition testimony except for purposes of impeachment. Complainants should be ordered to retrieve these materials and then file only those depositions of individuals that they intend to call (or that Respondents intend to call) at hearing. Respondents request leave to submit a motion for protective order relative to confidential information contained in any re-filed, properly designated depositions.

### III. CONCLUSION

For the reasons stated above, Respondents respectfully request that the Attorney Examiners grant this motion.



November 14, 2007

Respectfully submitted,



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Attorneys for Respondents

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Strike was filed on e-docket and served by facsimile and by ordinary U.S. mail on the following this 14th day of November, 2007.

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