9

JONES DAY

325 JOHN H. MCCONNELL BOULEVARD, SUITE 600
COLUMBUS, OHIO 43215-2673
TELEPHONE: 614.469.3939 • FACSIMILE: 614.461.4198

MAILING ADDRESS:
P.O. BOX 165017
COLUMBUS, OHIO 43216-5017

Direct Number: (614) 281-3880
mawhitt@jonesday.com

FILE

2007 NOV 26 PM 3:18
PUCO

JP104785/1387485
034569-685046

November 26, 2007

VIA HAND DELIVERY

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

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 Reply in Support of Motion to Strike Complainants' Filing of Depositions and Motion for Protective order filed November 23, 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))
Counsel of Record (w/enc.)

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 SM Date Processed 11/26/07

2007 NOV 26 PM 3: 18
PUCO
RECEIVED-DOCKETING DIV

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 IN SUPPORT OF RESPONDENTS' MOTION TO STRIKE COMPLAINANTS' FILING OF DEPOSITIONS AND MOTION FOR PROTECTIVE ORDER

In their opposition, Complainants either deliberately or inadvertently miss the point of Respondents' Motion to Strike. Either way, the result is the same: Complainants have failed to justify their failure to comply with the Scheduling Order regarding deposition designations. In so failing, they have placed an unnecessary and unwarranted burden on the Examiners and on Respondents to sift through hundreds of pages contained within the 33 depositions they filed as part of their case in chief. As that is clearly improper, the transcripts filed by Complainants on October 30, 2007 should be stricken.

Long on excuse and short on substance, Complainants offer a variety of reasons for their conduct. The most insidious, however, is buried in their brief but actually gets to the heart of the problem.

Complainants would have the Hearing Examiners believe that "each and every page" of their 4,200-page deposition filing (not including exhibits) is "necessary for Complainants to present their case." (Opp'n at 2.) This claim is absurd on its face. What appears more likely is that the Complainants simply don't know as yet what, if anything, they intend to use from these depositions. They simply stuff the record in a "we'll figure it out later" approach.

The problem, of course, is that by designating everything, they've essentially designated nothing. As the Examiners will recall, Complainants citied in their initial motion to two examples of deposition testimony which represent only a small sample of irrelevant material contained within the depositions. (*See* Memo. at 5-6 (describing irrelevant testimony regarding job responsibilities from the 1970s and 80s, corporate structure of CAPCO and union status of crew leader).) Given that Complainants ignore these examples, it is perhaps necessary, for emphasis, to compare the list of transcripts filed on October 30 with the deposition testimony cited in Complainants' direct testimony in order to expose the absurdity of the claim that "all testimony" and accompanying duplicative exhibits are necessary for Complainants to present their case.

The October 30 filing lists 33 transcripts. Complainants' three expert witnesses cite or refer to a total of 13 transcripts that they are relying on for the basis of their opinions, although surely not each and every page of these 13 depositions is either necessary or relevant for that purpose.[1] More to the point however, is the fact that there are still 20 transcripts *not* cited in Complainants' direct expert testimony that they claim are relevant to this case. How, of course, remains unexplained.

[1] None of the direct testimony of Complainants' various insurance representatives cites any of the testimony filed on October 30. Complainants' experts cite or refer to deposition testimony of the following witnesses: Spidle, Spach, Elliot, Parker, Porter, Western, Hough, Backer, Carr, Schwartz, Schnobrich, Ferncez and Etzell.

It is hard to fathom that every page of every transcript filed on October 30 (including transcripts not cited or mentioned in expert testimony) can be relevant to any claim or defense in the case. In addition to the impertinent information previously identified from a few transcripts, the following questions further demonstrates the disconnect between much of the information in these transcripts and any contested issues in this case:

— "And can you tell us who provided the power systems training in the 80s, in other words, was it a vendor or was it somebody from within FirstEnergy or Cleveland Illuminating Company?" (Austin Dep., p. 6)

— "What did you do with the US Army at Ft. Sill?" (Bienemann Dep., p. 8.)

— "Can you tell us how, for example, did Ohio Edison import and export bulk power back in 1997?" (Morgan Dep., p. 12.)

— "Was there any sort of protocol set up between 92 and 96 that if one of your crews was out on the line working and noticed some vegetation management issues how they would report that information to you?" (Munoz Dep., p. 129)

— "Describe the alarm system as it existed in 1983. And I'm not asking you for a real technical explanation. What I'm asking is what you saw, what you heard, what you would receive alarms about." (Sanicky Dep., p. 24.)

— "And as a system dispatcher in 1990, what were your job responsibilities?" (Spidle Dep., p. 42.)

— "And explain how the EMS system worked in 1991 when you began as a system dispatcher?" (Spidle Dep., p. 48.)

— "Do the contractors have some sort of password or access code to be able to access the FirstEnergy vegetation management system?" (Spach Dep., p. 26.)

— "Can you describe for me the type of knowledge you have regarding FE's transmission system?" (Spach Dep., p. 112.)

— "Do you know who the director of FES Solutions was in August of 2003?" (Elliot Dep., p. 80.)

— "What's the difference between brush and a tree in your mind?" (Etzel Dep., p. 91.)

— "You moved from the California Bay area to Falgstaff approximately 1998?" (Etzel Dep., p. 19.)

— "Was the bulk power sales and purchases that you were doing in 92 through 96 short term?" (Fout Dep., p. 27.)

— "Mr. Carr, you mentioned earlier that you found out about the cascading blackout while you were having dinner with your family; is that correct?" (Carr Dep., p. 62.)

— "Do you know what an independent power producer is?" (Parker Dep., p. 88.)

— "Did you have the authority to authorize overtime?" (Schnobrich Dep., p. 53.)

— "What is a megawatt?" (Hough Dep., p. 115.)

Without exception, these and other irrelevant questions were followed-up with additional irrelevant questions.

Complainants now want to shift to the Examiners and to Respondents the duty to separate the potential evidentiary wheat from the discovery deposition chafe. But shifting this duty is in direct contradiction of the reasons why the parties agreed to, and the Examiners required, designations in the first place. The purpose of this requirement is to clarify the issues in this case and narrow the amount of material used at hearing to what Complainants believe in good faith is necessary to support their case. The designations are to allow Respondents to: (a) prepare appropriate objections to the proposed submissions; (b) prepare responsive testimony: and (c) determine the possible confidentiality of the proposed testimony and prepare any necessary protective order motions.

Notably, the Examiners will have to review all of the objections and motions that may be filed by Respondents. Requiring the Examiners and the Respondents to wade through practically

every deposition taken by Complainants when those depositions are plainly unnecessary and not relied upon by Complainants is wasteful, unfair, unwarranted and unquestionably not what was envisioned by the Scheduling Order in this case. The failure to designate testimony puts Respondents at an unfair disadvantage by forcing Respondents to guess at what will be used at hearing or in post-hearing briefing.[2]

Complainants offer a litany of unavailing additional excuses as well. First is the excuse they've trotted out at every opportunity; the "this case is complex" excuse. But this excuse actually cuts against their very conduct. Given the potential size and complexity of this case, the need to avoid larding the record with irrelevant material is even more necessary than in a "routine" case.

Another excuse the Complainants use to justify their actions is their citation to apparent *ex parte* communications with the Examiners. Because Respondents were not privy to these conversations, Respondents cannot comment on Complainants' characterization of them. However, as the Scheduling Order plainly requires something other than the filing of entire transcripts. The Scheduling Order requires Complainants to file "all designations of those *portions* of any depositions that they intend to *introduce* at hearing." (Entry dated Sept. 28, 2007 at ¶ 2 (emphasis added).) This language is unmistakable. "Portions" means "part of," not "all." If the Attorney Examiners instead wanted a document dump of the majority of depositions and exhibits garnered during the discovery processes, the Scheduling Order presumably would have said so. It does not.

---

[2] In the unlikely event that the instant motion is denied, the Examiners should keep in mind throughout this case whether Complainants did what they say that they would do – *i.e.*, introduce every page of every deposition filed. Similarly, the Examiners should keep in mind, should they have to wade through all of this deposition testimony, whether all of this testimony is relevant. If, as Respondents believe, the Examiners come to understand the sheer falsity of Complainants' position that all of the filed deposition testimony is relevant, then the Examiners should consider Complainants' lack of credibility in judging the merits of this case.

Finally, Complainants cite the confidentiality agreement between the parties in this case. But this similarly affords no excuse for Complainants' filing. (*See* Opp'n at 2-3.) The Examiners have repeatedly explained that although the parties may enter into confidentiality agreements among themselves, such agreements are not binding on the Commission. (*See* Entry dated Nov. 2, 2007 at ¶ 8(a); Entry dated Oct. 16, 2007 at ¶ 4(a) (noting that agreements are not binding on Commission) Entry dated May 24, 2007 at ¶ 11 (denying motion for approval of confidentiality agreement).) Instead, the Examiners have established a process whereby Complainants must designate portions of depositions and Respondents must then review those portions for confidentiality. (*See* Entry dated Nov. 2, 2007 at ¶ 8.) This process is separate and apart from the parties' confidentiality agreement. (*See id.* at ¶ 8(a) (stating that protective order requirement controls regardless of the existence of a confidentiality agreement).) Nothing about Respondents' actions in connection with the confidentiality agreement excuses Complainants from designating portions of depositions, as required by the Scheduling Order.

Complainants' assertion regarding the lack of a "page line" designation requirement also misses the point. (*See* Opp'n at 3.) Regardless of the specific type of designation required, the Scheduling Order clearly requires *some* type of designation of *portions* of the depositions. Unless these words are to have no meaning, Complainants cannot seriously contend that this Order permits their omnibus filing.[3]

[3] Apparently believing that a good offense is the best defense, Complainants assert that Respondents' recent discovery responses are improper (and somehow justify Complainants' failure to comply with the deposition designation requirement). Putting aside the lack of any connection between Respondents' discovery responses and Complainants' disregard of the Scheduling Order, Complainants' characterization of Respondents' actions is wrong and misleading. Respondents did not produce documents outside of any applicable discovery period. When Respondents provided their responses to Complainants' first set of interrogatories in March 2007, Complainants were informed of specifically what documents would be produced as part of fact discovery and what would be produced in the course of expert discovery. Indeed, this is exactly what happened. Complainants were well aware that additional documents would be forthcoming during expert discovery. Complainants made no motion which compelled Respondents to reply any sooner than Respondents did. Given their broad and unfocused discovery

Because Complainants' omnibus filing is contrary to the Scheduling Order and grossly burdensome for the Examiners and the Respondents, Respondents' Motion to Strike should be granted.

November 23, 2007

Respectfully submitted,

/s/ Mark A. Whitt

David A. Kutik (Trial Counsel)
Lisa B. Gates
Meggan A. Rawlin
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Telephone: 216-586-3939
Facsimile: 216-579-0212
E-mail: dakutik@jonesday.com
lgates@jonesday.com
mrawlin@jonesday.com

Mark A. Whitt
JONES DAY
Mailing Address:
P.O. Box 165017
Columbus, Ohio 43216-5017
Street Address:
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215-2673
Telephone: 614-469-3939
Facsimile: 614-461-4198
E-mail: mawhitt@jonesday.com

Attorneys for Respondents

(continued...)

requests, Complainants cannot be heard to complain about the volume of the responsive materials (which consist of 216,000 *pages*, not 216,000 *documents*) because Respondents produced exactly what was asked for.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply in Support of Respondents' Motion to Strike was filed on e-docket this 23rd day of November, 2007. Copies will be served on the following parties of record in accordance with the November 2, 2007 Entry in this proceeding concerning electronic filing:

Edward F. Siegel, Esq.
27600 Chagrin Blvd., Suite 340
Cleveland, OH 44122

Francis E. Sweeney, Jr. Esq.
323 Lakeside Avenue, Suite 450
Cleveland, OH 44113

Mark S. Grotefeld, Esq.
Daniel G. Galivan, Esq.
Denenberg Tuffley, PLLC
105 West Adams Street, Suite 2300
Chicago, IL 60603

Charles R. Tuffley, Esq.
Melinda A. Davis, Esq.
Christina L. Pawlowski, Esq.
Matthew L. Friedman, Esq.
Denenberg Tuffley, PLLC
21 E. Long Lake Road, Suite 200
Bloomfield Hills, MI 48304

W. Craig Bashein, Esq.
Bashein & Bashein Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square, Suite 3500
Cleveland, OH 44113

Leslie E. Wargo, Esq.
McCarthy, Lebit, Crystal
& Liffman Co., L.P.A.
101 West Prospect Avenue
1800 Midland Building
Cleveland, OH 44115

/s/ Mark A. Whitt

Mark A. Whitt
An Attorney for Respondents