

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of S.G. Foods,)
Inc., Pak Yan Lui, and John Summers,)
Complainants,)
v.) Case No. 04-28-EL-CSS
FirstEnergy Corp., American Transmission)
Systems, Inc., Ohio Edison Company, and)
The Cleveland Electric Illuminating Com-)
pany,)
Respondents.)

In the Matter of the Complaint of Miles Man-)
agement Corp., Alok Bhajji, M.D., Inc., Union)
House Bar & Restaurant, and Regional Ther-)
apy, Inc.,)
Complainants,)
v.) Case No. 05-803-EL-CSS
FirstEnergy Corp. and American Transmis-)
sion Systems, Inc.,)
Respondents.)

In the Matter of the Complaint of Allianz US)
Global Risk Insurance Company, Lexington)
Insurance Company, and Royal Indemnity)
Company, as Subrogees of Republic Engi-)
neered Products Inc.,)
Complainants,)
v.) Case No. 05-1011-EL-CSS
FirstEnergy Corp., American Transmission)

Systems, Inc., Cleveland Electric Illuminating)
Company, Jersey Central Power and Light)
Company, Metropolitan Edison Company,)
Ohio Edison Company, Pennsylvania Electric)
Company, Toledo Edison Company, and The)
Illuminating Company,)

Respondents.)

In the Matter of the Complaint of Lexington)
Insurance Company, Frankenmuth Mutual)
Insurance Company, Charter Oak Fire Insur-)
ance Company, The Automobile Insurance)
Company of Hartford, The Standard Fire)
Insurance Company, Travelers Indemnity)
Company of America, Travelers Indemnity)
Company of Connecticut, Travelers Indem-)
nity Company, Travelers Property Casualty)
Company of America, Phoenix Insurance)
Company, St. Paul Mercury Insurance Com-)
pany, St. Paul Surplus Lines Insurance Com-)
pany, United States Fidelity & Guaranty,)
Allied Mutual Insurance Company, and)
Nationwide Mutual Insurance, as Subrogees)
of Their Insureds,)

Complainants,)

v.)

Case No. 05-1012-EL-CSS

FirstEnergy Corp., American Transmission)
Systems, Inc., The Cleveland Electric Illumi-)
nating Company, Jersey Central Power and)
Light Company, Metropolitan Edison Com-)
pany, The Ohio Edison Company, Pennsyl-)
vania Electric Company, Toledo Edison)
Company, and The Illuminating Company,)

Respondents.)

In the Matter of the Complaint of BMW
Pizza, Inc. and DPNY, Inc., et al.,

Complainants,

v.

Case No. 05-1014-EL-CSS

FirstEnergy Corp., American Transmission
Systems, Inc., Ohio Edison Company, The
Cleveland Electric Illuminating Company,
The Toledo Edison Company, Pennsylvania
Power Company, American Electric Power,
Midwest Independent Transmission System
Operator, Inc., PJM Interconnection, LLC,
and John Does 1-100,

Respondents.

In the Matter of the Complaint of Triple A
Sport Wears, Inc.,

Complainants,

v.

Case No. 05-1020-EL-CSS

FirstEnergy Corp. and American Transmis-
sion Systems, Inc.,

Respondents.

In the Matter of the Complaint of Dennis
Kucinich,

Complainant,

v.

Case No. 03-1833-EL-CSS

First Energy, on behalf of The Cleveland
Electric Illuminating Company, Ohio Edison
Company, and The Toledo Edison Company,

Respondents.)

ENTRY

The Commission finds:

- (1) On August 14, 2003, portions of the northeastern part of the United States and the southeastern part of Canada experienced a widespread loss of electrical power (blackout).
- (2) On August 15, 2003, President George W. Bush and then-Prime Minister Jean Chrétien of Canada established a joint U.S.-Canada Power System outage Task Force to establish the cause of the blackout. On March 31, 2004, the task force issued its final report (task force report). The task force determined that the initial events that led to the cascading blackout occurred in Ohio and reported that there were a number of major causes of the blackout, as well as various additional identified problems. (Task Force Report at 17-20, as attached to the October 25, 2004, memorandum contra filed by the S.G. Foods complainants, as defined below.¹)
- (3) Between August 20, 2003, and August 15, 2005, several complaints were filed with the Commission relating to the blackout. Inasmuch as the issues arising in these complaints overlap to a large extent, the Commission finds that these cases should be consolidated for hearing and ultimate resolution. In this entry, we will first review the current status of each individual case and then will proceed to resolve various procedural issues that have arisen.

S.G. Foods Complaint

- (4) On January 12, 2004, S.G. Foods, Inc., Pak Yan Lui, and John Summers (S.G. Foods complainants) filed a complaint in Case No. 04-22-EL-CSS (S.G. Foods complaint), individually and on behalf of all other persons similarly situated, against FirstEnergy Corp. (FE);² American Transmission Systems, Inc. (ATSI); Ohio Edison Company (OE); The Cleveland Electric

¹ See finding (62), for a description of the memorandum contra.

² Various of the consolidated complaints listed this respondent as FirstEnergy Corporation. According to the answers, the correct name should read FirstEnergy Corp.

Illuminaing Company (CEI); and one hundred unnamed persons (S.G. Foods respondents) alleging, *inter alia*, that the S.G. Foods respondents failed to furnish necessary adequate service and facilities to the S.G. Foods complainants and that the service and/or facilities provided by one or more of the S.G. Foods respondents was at least partially responsible for causing the blackout, thereby causing financial harm to the S.G. Foods complainants. Specifically, the S.G. Foods complainants allege that

- (a) the S.G. Foods respondents breached their legal duty to exercise due care toward the S.G. Foods complainants;
 - (b) FE failed to comply with rules related to its transmission system;
 - (c) the blackout resulted from FE's recklessness, wantonness and/or gross negligence;
 - (d) FE's tree trimming around its transmission lines was reckless, wanton, and grossly negligent;
 - (e) FE's separation of its local system from the remainder of the electric grid was reckless, wanton, and grossly negligent;
 - (f) the S.G. Foods respondents failed to exercise ordinary or slight care and diligence;
 - (g) the S.G. Foods respondents intentionally failed to perform a duty;
 - (h) the actions of S.G. Foods respondents were reckless and wanton;
 - (i) a reasonably prudent utility company would have anticipated likely injuries; and
 - (j) the S.G. Foods respondents' actions proximately caused foreseeable damages suffered by the S.G. Foods complainants.
- (5) Based on these allegations, the S.G. Foods complainants pray for findings that

- (a) the S.G. Foods respondents failed to furnish necessary and adequate service and facilities;
 - (b) the service and/or facilities of one or more of the S.G. Foods respondents was at least partially responsible for the blackout;
 - (c) an order certifying the complaint as a class action;
 - (d) reasonable attorneys' fees and costs; and
 - (e) other just and proper relief.
- (6) On February 2, 2004, the S.G. Foods respondents filed an answer, denying many of the allegations in the S.G. Foods complaint and raising several affirmative defenses. Among those defenses is the assertion that the Commission has no authority to hear class actions.
- (7) By entry dated August 12, 2004, the attorney examiner denied the class action issues in the S.G. Foods complaint and dismissed the one hundred unnamed respondents.
- (8) On October 15, 2004, the S.G. Foods respondents filed a motion to preclude the admission of the task force report into evidence in this proceeding and to preclude any expert from rendering opinions based upon the task force report. The S.G. Foods complainants filed a memorandum contra that motion on October 22, 2004, and the S.G. Foods respondents filed a reply memorandum on October 29, 2004. The motion is pending.

Miles Complaint

- (9) On July 11, 2005, Miles Management Corp., Alok Bhajji, M.D., Inc., Union House Bar & Restaurant, and Regional Therapy, Inc. (Miles complainants), filed a complaint in Case No. 05-803-EL-CSS (Miles complaint), individually and on behalf of all other persons similarly situated, against FE and ATSI (Miles respondents), alleging, *inter alia*, that the Miles respondents caused and/or permitted the blackout, thereby causing substantial losses on the part of the Miles complainants. Specifically, the Miles complainants allege that,
- (a) as a direct and proximate result of the Miles respondents' failure to abide by the common law standard of

due care, the Miles complainants have suffered substantial damages;

- (b) as a direct and proximate result of the Miles respondents' reckless disregard and indifference, the Miles complainants have suffered substantial damages;
 - (c) as a direct and proximate result of the Miles respondents' breach of express and/or implied warranties and agreements, the Miles complainants have suffered substantial damages; and
 - (d) as a direct and proximate result of the Miles respondents' failure to comply with regulatory and statutory obligations, the Miles complainants have suffered substantial damages.
- (10) Based on these allegations, the Miles complainants pray for
- (a) an award of treble damages under Section 4905.61, Revised Code; and
 - (b) such other relief as the Commission is authorized to grant, including, legal fees, pre-judgment interest, punitive damages, appropriate equitable and declaratory relief, and costs of this action.
- (11) On July 11, 2005, the Miles respondents filed an answer to the Miles complaint, denying numerous of the allegations in the Miles complaint and raising several affirmative defenses. Among those defenses are the assertions that
- (a) the Commission has no authority to hear class actions;
 - (b) FE is not a public utility and, therefore, the Commission has no jurisdiction over it; and
 - (c) the Miles respondents lack standing to bring the Miles complaint.
- (12) By entry dated July 13, 2005, the attorney examiner denied the class action issues in the Miles complaint.

Allianz Complaint

- (13) On August 15, 2005, Allianz US Global Risk Insurance Company, Lexington Insurance Company, and Royal Indemnity Company, as Subrogees of Republic Engineered Products Inc. (Allianz complainants), filed a complaint in Case No. 05-1011-EL-CSS (Allianz complaint) against FE, ATSI, CEL, Jersey Central Power and Light Company (Jersey), Metropolitan Edison Company (Metropolitan), OE, Pennsylvania Electric Company (Pennsylvania), Toledo Edison Company (TE), and the Illuminating Company (collectively, Allianz respondents), alleging, *inter alia*, that the Allianz respondents violated Section 4933.83 and 4905.26, Revised Code, thereby causing or contributing to the blackout, and causing losses on the part of the Allianz complainants. Specifically, the Allianz complainants allege that,
- (a) as a direct and proximate result of the Allianz respondents' violation of their duties under Section 4933.83(b), Revised Code, to furnish adequate facilities, an entity insured by the Allianz complainants suffered certain losses, thereby causing damages to the Allianz complainants as insurers;
 - (b) as a direct and proximate result of the Allianz respondents' violation of their duties under Section 4905.26, Revised Code, to provide reasonable, sufficient, and adequate service, an entity insured by the Allianz complainants suffered certain losses, thereby causing damages to the Allianz complainants as insurers;
 - (c) as a direct and proximate result of the Allianz respondents' reckless, wanton, and grossly negligent breach of their duty to exercise reasonable care, an entity insured by the Allianz complainants suffered certain losses, thereby causing damages to the Allianz complainants as insurers; and
 - (d) as a direct and proximate result of the Allianz respondents' grossly negligent breach of their duty to exercise reasonable care, an entity insured by the Allianz complainants suffered certain losses, thereby causing damages to the Allianz complainants as insurers.
- (14) Based on these allegations, the Allianz complainants pray for

- (e) a statutory finding of a violation of Section 4933.83 or 4905.26, Revised Code;
 - (f) a finding that the negligence or gross negligence of one or more of the Allianz respondents caused or contributed to the blackout;
 - (g) a statutory finding pursuant to Section 4905.61, Revised Code, that one or more of the Allianz respondents' violations of Chapters 4905 or 4933, or other provision of Title 49, Revised Code, proximately caused the blackout;
 - (h) an award of fees, expenses, and costs of this action pursuant to Section 4903.24, Revised Code; and
 - (i) such other relief as the Commission may deem just and proper.
- (15) On September 27, 2005, the Allianz complainants filed a notice of voluntary dismissal of Metropolitan, Jersey, and Pennsylvania.
- (16) On October 4, 2005,³ the Allianz respondents filed an answer, denying numerous of the allegations in the Allianz complaint and raising several affirmative defenses. Among those defenses are the assertions that
- (a) FE is not a public utility and, therefore, the Commission has no jurisdiction over it;
 - (b) the Commission lacks jurisdiction to award certain types of relief requested in the Allianz complaint;
 - (c) the Allianz respondents lack standing to bring the Allianz complaint; and
 - (d) subrogation claims violate public policy.
- (17) On January 13, 2006, the Allianz respondents filed a motion to dismiss on grounds that
- (a) any claim under Section 4933.83, Revised Code, must fail, as the Allianz complaint makes allegations related

³ The attorney examiner allowed an extension of time to file the answer.

to transmission facilities and the cited section applies only to distribution facilities and only in a context that is completely different than the present proceeding;

- (b) simply alleging that a single outage occurred is not sufficient to show inadequate service under Section 4905.22, Revised Code; and
 - (c) public policy requires that a subrogation claim be dismissed as ratepayers would then be paying for both insurance premiums and the liability that the insurance was designed to cover.
- (18) On February 10, 2006,⁴ the Allianz complainants filed a memorandum contra the motion to dismiss. In that memorandum, the Allianz complainants contend that FE is subject to the jurisdiction of the Commission; that the motion to dismiss is untimely; that the Allianz complaint adequately states a claim for inadequate service under Section 4933.81, 4933.83, or 4905.26, Revised Code; that the negligence and gross negligence claims in the Allianz complaint are appropriately before the Commission; and that the action by the Allianz complainants, as subrogees, does not violate public policy.
- (19) On February 21, 2006, the Allianz respondents filed a reply memorandum further addressing the issues in the memorandum contra.

Lexington Complaint

- (20) On August 15, 2005, Lexington Insurance Company, Frankenthuth Mutual Insurance Company, Charter Oak Fire Insurance, The Automobile Insurance Company of Hartford, The Standard Fire Insurance Company, Travelers Indemnity Company of America, Travelers Indemnity Company of Connecticut, Travelers Indemnity Company, Travelers Property Casualty Company of America, Phoenix Insurance Company, St. Paul Mercury Insurance Company, St. Paul Surplus Lines Insurance Company, United States Fidelity & Guaranty, Allied Mutual Insurance Company, and Nationwide Mutual Insurance, As Subrogees of Their Insureds (Lexington complainants), filed a complaint in Case No. 05-1012-EL-CSS (Lexington complaint)

⁴ The attorney examiner granted an extension of time to file the memorandum contra.

against FE, ATSI, CEL, Jersey, Metropolitan, OE, Pennsylvania, TE, and The Illuminating Company (Lexington respondents), alleging, *inter alia*, that the respondents violated Section 4933.83 and 4905.26, Revised Code, thereby causing or contributing to a the blackout, and causing losses on the part of the Lexington complainants. Specifically, the Lexington complainants allege that,

- (a) as a direct and proximate result of the Lexington respondents' violation of their duties under Section 4933.83(b), Revised Code, to furnish adequate facilities, entities insured by the Lexington complainants suffered certain losses, thereby causing damages to the Lexington complainants as insurers;
 - (b) as a direct and proximate result of the Lexington respondents' violation of their duties under Section 4905.26, Revised Code, to provide reasonable, sufficient, and adequate service, entities insured by the Lexington complainants suffered certain losses, thereby causing damages to the Lexington complainants as insurers;
 - (c) as a direct and proximate result of the Lexington respondents' reckless, wanton, and grossly negligent breach of their duty to exercise reasonable care, entities insured by the Lexington complainants suffered certain losses, thereby causing damages to the Lexington complainants as insurers; and
 - (d) as a direct and proximate result of the Lexington respondents' grossly negligent breach of their duty to exercise reasonable care, entities insured by the Lexington complainants suffered certain losses, thereby causing damages to the Lexington complainants as insurers.
- (21) Based on these allegations, the Lexington complainants pray for
- (a) a statutory finding of a violation of Section 4933.83 or 4905.26, Revised Code;
 - (b) a finding that the negligence or gross negligence of one or more of the Lexington respondents caused or contributed to the blackout;

- (c) a statutory finding pursuant to Section 4905.61, Revised Code, that one or more of the Lexington respondents' violations of Chapter 4905, 4933, or other provision of Title 49, Revised Code, proximately caused the blackout;
 - (d) an award of fees, expenses, and costs of this action pursuant to Section 4903.24, Revised Code; and
 - (e) such other relief as the Commission may deem just and proper.
- (22) On September 27, 2005, the Lexington complainants filed a notice of voluntary dismissal of Metropolitan, Jersey, and Pennsylvania.
- (23) On October 4, 2005,⁵ the Lexington respondents filed an answer, denying numerous of the allegations in the Lexington complaint and raising several affirmative defenses. Among those defenses are the assertions that
- (f) FE is not a public utility and, therefore, the Commission has no jurisdiction over it;
 - (g) the Commission lacks jurisdiction to award certain types of relief requested in the Lexington complaint;
 - (h) the Lexington complainants lack standing to bring the Lexington complaint; and
 - (i) subrogation claims violate public policy.
- (24) On January 13, 2006, the Lexington respondents filed a motion to dismiss on grounds that
- (a) any claim under Section 4933.83, Revised Code, must fail, as the Lexington complaint makes allegations related to transmission facilities and the cited section applies only to distribution facilities and only in a context that is completely different than the present proceeding;

⁵ The attorney examiner allowed an extension of time to file the answer.

- (b) simply alleging that a single outage occurred is not sufficient to show inadequate service under Section 4905.22, Revised Code; and
 - (c) public policy requires that a subrogation claim be dismissed as ratepayers would then be paying for both insurance premiums and the liability that the insurance was designed to cover.
- (25) On February 10, 2006,⁶ the Lexington complainants filed a memorandum contra the motion to dismiss. In that memorandum, the Lexington complainants contend that FE is subject to the jurisdiction of the Commission; the motion to dismiss is untimely; the Lexington complaint adequately states a claim for inadequate service under Section 4933.81, 4933.83, or 4905.26, Revised Code; the negligence and gross negligence claims in the Lexington complaint are appropriately before the Commission; and the action by the Lexington complainants, as subrogees, does not violate public policy.
- (26) On February 21, 2006, the Lexington respondents filed a reply memorandum further addressing the issues in the memorandum contra.

BMW Complaint

- (27) On August 15, 2005, BMW Pizza, Inc. & DPNY, Inc., and 529 other named persons or entities (BMW complainants),⁷ filed a complaint in Case No. 05-1014-EL-CSS (BMW complaint) against FE; ATSI; OE; CEI; TE; Pennsylvania; American Electric Power (AEP); Midwest Independent Transmission System Operator, Inc. (MISO); PJM Interconnection, LLC (PJM); and John Does 1-100 (BMW respondents), alleging, *inter alia*, that the BMW respondents failed to abide by various provisions of chapters 4901, 4902, 4905, 4909, and 4933 of the Revised Code, thereby causing a power outage that occurred on August 14, 2003, and causing losses on the part of the BMW complainants. Specifically, the BMW complainants allege, *inter alia*, that

⁶ The attorney examiner granted an extension of time to file the memorandum contra.

⁷ A complete list of these complainants may be found in the Commission's website, on the following page: <http://dis.puc.state.oh.us/CMPDFs/ZYCR8K01RLLQ8P62.pdf>.

- (a) as a direct and proximate result of the BMW respondents' negligence, the BMW complainants suffered damages and losses;
 - (b) as a direct and proximate result of the BMW respondents' willful, wanton, and reckless conduct, the BMW complainants suffered damages and losses;
 - (c) as a direct and proximate result of the BMW respondents' breach of express and/or implied warranties and agreements, which agreements arose separate and apart from any rights or obligations imposed by any governmental law, regulation, or other authority directed to utilities, the BMW complainants suffered damages and losses; and
 - (d) as a direct and proximate result of the BMW respondents' failure to comply with their regulatory and statutory obligations, including but not limited to those imposed by the Commission and those codified in Chapters 4901, 4903, 4905, 4909, and 4933, Revised Code, the BMW complainants suffered damages and losses.
- (28) Based on these allegations, the BMW complainants pray for
- (a) an award of treble damages under Section 4905.61, Revised Code; and
 - (b) such other relief as the BMW complainants and their counsel are entitled to receive, including legal fees, litigation expenses, pre-judgment interest, punitive damages, appropriate equitable and declaratory relief, and costs of this action.
- (29) On September 12, October 6, and October 7, 2005,⁸ the BMW respondents filed answers, denying numerous of the allegations in the BMW complaint and raising several affirmative defenses. Specifically, the BMW respondents made the following filings:

⁸ The attorney examiner allowed an extension of time to file the answer.

- (a) FE and its named subsidiaries filed their answer on October 6, 2005. Among their affirmative defenses are the assertions that
1. FE is not a public utility and, therefore, the Commission has no jurisdiction over it;
 2. the Commission lacks jurisdiction to award certain types of relief requested in the BMW complaint; and
 3. FE and its named subsidiaries owed no legal duty to any BMW complainants who were not its customers;
 4. certain of the BMW respondents lack standing to bring the Lexington complaint;
 5. subrogation claims violate public policy; and
 6. the BMW complainants failed to properly plead subrogation claims.
- (b) AEP filed its answer on September 12, 2005.⁹ Among its affirmative defenses are the assertions that
1. the BMW complainants lack standing;
 2. the Commission cannot award monetary damages as requested in the BMW complaint;
 3. the Commission lacks jurisdiction over the parent company, American Electric Power Company, Inc., for purposes of this complaint;
 4. the Commission lacks jurisdiction over "John Does 1-100" if those individuals are intended to represent employees of AEP; and
 5. AEP owed no legal duty to the BMW complainants.
- (c) MISO filed its answer on October 7, 2005. Among its affirmative defenses are assertions that

⁹ In its answer, AEP noted that it is assuming that the BMW respondents intended to name Columbus Southern Power Company (CSP) and Ohio Power Company (OP), rather than AEP, their parent company. Therefore, the answer is filed by AEP, CSP, and OP, collectively. In this entry, the term "AEP" shall refer to all three entities.

1. the Commission lacks jurisdiction over MISO;
 2. the Commission lacks jurisdiction over "John Does 1-100" if those individuals are intended to represent employees of MISO;
 3. the BMW complainants lack standing; and
 4. MISO owes no legal duty to the BMW complainants.
- (d) PJM filed its answer on October 7, 2005. Among its affirmative defenses are assertions that
1. the Commission lacks jurisdiction over PJM;
 2. the BMW complainants lack standing to bring claims against PJM; and
 3. PJM owes no duties to the BMW complainants.
- (30) AEP, MISO, and PJM filed motions to dismiss the BMW complaint against them, on September 12, October 7, and October 26, 2005, respectively. On November 7, 2005, the BMW complainants filed a motion to dismiss their complaint against AEP, MISO, and PJM. That motion is unopposed and should be granted.¹⁰
- (31) On January 13, 2006, FE and its named subsidiaries filed a motion to dismiss the BMW complaint on grounds, *inter alia*, that
- (a) FE is not a public utility and therefore cannot be liable for allegedly failing to provide utility service;
 - (b) Pennsylvania is not subject to Commission jurisdiction as it does not render service in Ohio;
 - (c) non-customers may not bring claims for losses;
 - (d) many of the BMW complainants are not adequately identified;
 - (e) the BMW complaint fails to allege necessary facts; and

¹⁰ For the remainder of this entry, the term "BMW respondents" shall not include AEP, MISO, or PJM.

(f) the relief sought is contrary to public policy.

- (32) On February 13, 2006, the BMW complainants filed a memorandum contra the FE motion to dismiss,¹¹ disputing each of the respondents' arguments. On February 21, 2006, FE filed a reply to the memorandum contra. The motion is pending.

Triple A Complaint

- (33) On August 15, 2005, Triple A Sport Wears, Inc. (Triple A), filed a complaint in Case No. 05-1020-EL-CSS (Triple A complaint) against FE and ATSI (Triple A respondents), alleging, *inter alia*, that the Triple A respondents breached their statutory obligations to furnish necessary and adequate service and facilities to Triple A, resulting in the blackout and the occurrence of a robbery at Triple A's business. Specifically, the Triple A complainants allege, *inter alia*, that,

- (a) as a proximate result of the Triple A respondents' breach of their duty to exercise due care, Triple A suffered injuries; and
- (b) as a result of the Triple A respondents' recklessness, wantonness, negligence, and/or gross negligence in failing to meet certain standards and practices in the industry, Triple A suffered injuries.

- (34) Based on these allegations, Triple A prays for

- (a) a statutory finding that one or more of the Triple A respondents failed to furnish necessary and adequate service and facilities to Triple A;
- (b) a statutory finding that service and/or facilities provided by one or more of the Triple A respondents was at least partially responsible for the blackout;
- (c) for reasonable attorneys' fees and the costs of this action; and
- (d) such other relief as the Commission may deem just and proper.

¹¹ The attorney examiner granted an extension of time to file the response.

- (35) On September 6, 2005, the Triple A respondents filed an answer, denying numerous of the allegations in the Triple A complaint and raising several affirmative defenses. Among those defenses are the assertions that
- (a) FE is not a public utility and, therefore, the Commission has no jurisdiction over it;
 - (b) the Commission lacks jurisdiction to award certain types of relief requested in the Triple A complaint;
 - (c) the Triple A respondents owed no legal duty to Triple A; and
 - (d) Triple A lacks standing to bring the Triple A complaint.
- (36) On September 6, 2005, the Triple A respondents also filed a motion to dismiss the Triple A complaint on the grounds that
- (a) FE is not a public utility and, therefore, the Commission has no jurisdiction over it; and
 - (b) ATSI owes no legal duty to Triple A.
- (37) On September 27, 2005, Triple A filed a memorandum contra the motion to dismiss.¹² The Triple A respondents filed a reply on October 5, 2005. The motion is pending.

Kucinich complaint

- (38) On August 20, 2003, Dennis Kucinich filed a complaint (Kucinich complaint) against FE, on behalf of its subsidiaries, CEL, OE, and TE (Kucinich respondents). In the complaint, Mr.

¹² The Commission would point out that this memorandum contra was filed out of time and was procedurally defective. The motion to dismiss was filed on September 6, 2005. Rule 4901-1-12, Ohio Administrative Code (O.A.C.) allows the filing of a memorandum contra within 15 days after service. Rule 4901-1-07, O.A.C., allows an additional three days where service was made by mail, as occurred in this circumstance. That rule also extends the due date where that due date would otherwise fall on a weekend or legal holiday. In this circumstance, the memorandum contra was due on Monday, September 26, 2005. In addition, Rule 4901-1-02(B)(8), O.A.C., provides that documents may be filed by facsimile transmission, as was done here, only if the original is delivered to the Commission no later than the next business day. The original of this document was not provided until two days after facsimile transmission. Although the Commission will waive these defects in this particular circumstance, we would caution the parties to comply with the Commission's rules and the orders of the attorney examiner.

Kucinich alleges that he is a member of the United States Congress, representing numerous individuals who reside in the CEI service territory, and also is, himself, a resident of the CEI service territory. Mr. Kucinich argues, *inter alia*, that the respondents have failed to provide physically adequate service, resulting in the blackout. Specifically, Mr. Kucinich alleges that

- (a) the Kucinich respondents failed to provide physically adequate service, as required by Section 4933.83, Revised Code;
 - (b) the Kucinich respondents failed to provide necessary and adequate service, as required by Section 4905.22, Revised Code; and
 - (c) the Kucinich respondents failed to comply with their transition plans, resulting in the necessity to redetermine proper stranded investments and shopping credits.
- (39) Based on these allegations, Mr. Kucinich prays for
- (a) a finding that the Kucinich respondents have not provided reasonable and adequate service as required by Chapter 49, Revised Code;
 - (b) a finding that the Kucinich respondents have not furnished adequate facilities to meet the reasonable needs of consumers and inhabitants in the certified territory, as required by Section 4933.83, Revised Code;
 - (c) authorization for another electric supplier to furnish electric service in the territories of the Kucinich respondents, and amendment of the maps of the certified territories; and
 - (d) such other relief as is justified.
- (40) On September 15, 2003, the Kucinich respondents timely filed an answer to the Kucinich complaint, denying numerous of the allegations in the Kucinich complaint and raising several affirmative defenses. Among those defenses are the assertions that
- (a) the Commission has no jurisdiction over FE;

- (b) Mr. Kucinich is not a customer of any of the Kucinich respondents and therefore lacks standing to maintain a claim against them;
 - (c) Mr. Kucinich lacks standing to assert any claim on behalf of others;
 - (d) the Commission lacks jurisdiction to authorize another electric supplier to serve the Kucinich respondents' territory, except after compliance with certain procedural requirements; and
 - (a) modification of their territories would be unconstitutional.
- (41) On September 24, 2003, a motion to intervene and a purported secondary complaint were filed in this same docket, by the Neighborhood Environmental Coalition (Coalition) and the Consumers for Fair Utility Rates (Consumers), against the Kucinich respondents, and also against FE itself. Coalition and Consumers assert that the Kucinich respondents and FE failed to provide necessary and adequate service, as required by Section 4905.22, Revised Code, and failed to charge just and reasonable charges, as required by Section 4905.22, Revised Code. Coalition and Consumers therefore request that the Commission investigate the causes of the blackout and ensure that the transmission lines and system of the Kucinich respondents and FE are maintained and integrated so as to provide safe, reliable, efficient, and low-cost electric utility services. They ask that the Commission appoint independent hearing masters to conduct the needed investigation of both the Kucinich respondents and FE and, also, the activities of the Commission itself. Coalition and Consumers demand that the Commission find that necessary and adequate service has not been provided, that charges have been unreasonable and unjust, and that the Commission order the payment of compensation and punitive damages in the amount of at least 1,000 dollars to each customer of the Kucinich respondents and FE. Finally, they ask that the various other operational changes be ordered by the Commission.
- (42) On October 14, 2005, the Kucinich respondents filed a memorandum contra the intervention of Coalition and Consumers, as well as a request for the dismissal of FE based on the

Commission's lack of jurisdiction over it. The Kucinich respondents assert, *inter alia*, that

- (a) the Coalition and Consumers intervention would be the functional equivalent of a class action;
 - (b) the motion and complaint do not state whether the individuals in Coalition and Consumers have consented to the action;
 - (c) the motion and complaint do not satisfactorily identify the individuals in Coalition and Consumers;
 - (d) there is no Commission precedent for allowing an organization or advocacy group to prosecute the interests of unnamed members in a proceeding such as this one; and
 - (e) Coalition and Consumers lack standing as customers themselves and have not demonstrated the standing of their members.
- (43) On November 13, 2003, Coalition and Consumer filed a reply to the memorandum contra their motion to intervene. They indicate that
- (a) Coalition and Consumers fall within the definition of a "person" under Rule 4901-1-01(J), O.A.C.
 - (b) there is no requirement that individual customers be named in a complaint;
 - (c) there is no requirement that a corporation document its authority to act; and
 - (d) there is no authority that a complainant be a customer of the utility against whom it is complaining.
- (44) The motion to intervene is pending.

Commission Jurisdiction

- (45) Many of the consolidated complaints include allegations and causes of actions that are identified by the complainants as tort or breach of contract claims. This Commission is a creature of

statute and has only the authority given to it by the legislature. That statutory authority includes the power to determine service-related complaints under the provisions of Section 4905.26, Revised Code. The Commission does not have any jurisdiction over complaints that sound purely in tort or breach of contract.

- (46) However, just because a complainant identifies a cause of action in a particular manner does not necessarily mean that such a claim is or is not within the exclusive jurisdiction of the Commission. *State ex rel. Columbia Gas of Ohio, Inc. v. Henson*, 102 Ohio St.3d 349 (2004) (para. 18-19); *State ex rel. the Illuminating Company v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St.3d 69 (2002) (para. 21). Rather, the Ohio Supreme Court has instructed that an analysis of the claims be undertaken to determine whether the substance of the complaint is manifestly service-related. *Henson* at para. 20, and cases cited therein.
- (47) The Commission finds that, although many of the causes of actions are expressly described as negligence or contract actions, on the face of the consolidated complaints it appears that all of the claims arise from complainants' assertions that respondents failed to provide appropriate service or facilities at the time of the blackout. Thus, we will not at this point dismiss any of the complaints on this jurisdictional ground. However, it should be noted that, if, during the course of these proceedings, we determine that certain claims are outside of our jurisdiction, we will then dismiss such claims. In addition, parties should be aware that this Commission will consider all complaints from the standpoint of the respondents' compliance with various statutes found within Title 49 of the Revised Code, as well as the administrative rules promulgated thereunder and the applicable tariffs.

Standing of Complainants

- (48) Complainants in the consolidated cases fall into several categories: (a) customers and consumers within the Ohio certified service territory of the Ohio electric utility company named as a respondent; (b) customers or consumers within the Ohio certified service territory of an Ohio electric utility company, but who do not take distribution service from the respondent utility; (c) residents of another state who are neither customers of the named respondent nor consumers of electricity supplied by

the named respondent; (d) persons for whom the Commission has no information regarding customer and/or consumer status; and (e) insurers of any of the preceding categories. In many of the consolidated cases, the respondents argue that the complainants have no standing to bring service quality complaints before the Commission, on the grounds of customer or consumer status. The respondents in several of the consolidated cases have argued that the complaints by any complainants other than those in the first category (that is, those who are Ohio customers or consumers of a respondent) should be dismissed.

- (49) The Commission's jurisdiction is statutory. Therefore, the determination of the standing necessary for a potential complainant to file an action before the Commission must be based on a close reading of applicable statutes. Section 4905.22, Revised Code, requires every "public utility" to furnish "necessary and adequate service and facilities" and to furnish, with respect to its business, "such instrumentalities and facilities as are adequate and in all respects just and reasonable." This section does not include any limitation regarding the identification of the persons to whom such items must be provided. Similarly, Section 4905.26, Revised Code, allows "any person, firm, or corporation" to file a complaint against any public utility regarding its service. Complainants are not required by that section to fall within any particular category. Thus, it would appear from a reading of only these two sections that, for example, a consumer in New York could file a complaint before the Commission regarding the service of CEI. However, the reading must be more complete.
- (50) The complaint that is authorized in Section 4905.26, Revised Code, must be against a "public utility," just as it is only "public utilities" that are required to provide adequate service. Section 4905.02, Revised Code, supplies the definition of the term "public utility," limiting that term to "every corporation . . . defined in section 4905.03 of the Revised Code . . ." Section 4905.03, Revised Code, sets forth a list of the specific types of entities that are deemed to be public utilities for purposes of Title 49. The relevant subsection provides that a "public utility" may be "an electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes *to consumers within this state*, including supplying electric

transmission service for electricity delivered *to consumers in this state*, but excluding a regional transmission organization approved by the federal energy regulatory commission . . .” Section 4905.03(A)(4), Revised Code (emphasis added). Thus, a company is only a public utility when it is supplying electricity or transmission services to consumers within the state of Ohio.

- (51) Returning to Section 4905.26, Revised Code, with an understanding of the definition of the term “public utility,” we now can more thoroughly understand the legislature’s authorization for the filing of complaints before the Commission. This section provides that any person can file a complaint before the Commission only against a “public utility,” which is, by definition, a utility when it is supplying electricity, which includes transmission service, to consumers in Ohio. While it is not a model of clarity, the Commission reads this language to limit the Commission’s jurisdiction to hearing service-quality complaints by customers of Ohio utilities and consumers of electricity in Ohio, against the providers of that electricity. In the event of a complaint by any other category of person, the respondent would not be in the business of supplying electricity to a consumer within this state. In reaching this conclusion, the Commission is also cognizant of Section 4905.05, Revised Code, which specifically limits the scope of our jurisdiction to intra-Ohio business activities.
- (52) Unfortunately, the Miles complaint, the Allianz complaint, the Lexington complaint, the BMW complaint, the Triple A complaint, and the Kucinich complaint do not clearly set forth the complainants’ status as Ohio customers or consumers at the time of the blackout, or the aspect of the respondents’ service about which complaint is being made. Therefore, the Commission will allow any of the complaints in the consolidated cases to be appropriately amended, within 14 days of the date of the entry. Following that date, the complaint by any complainant that is not clearly identified as an Ohio customer or consumer will be dismissed. Similarly, the complainants must identify the Ohio electric light company that provides their service.
- (53) In certain of the consolidated cases, the complainants are insurance companies, bringing actions in subrogation, based upon damages allegedly suffered by their insureds. For such actions to be appropriate, the insured entity should be one who could,

in its own right, file a complaint under the parameters previously set forth. In addition, both the insurance company and the insured should be named complainants. See, for e.g., *The Northwestern Ohio Natural Gas Co. v. The First Congregational Church of Toledo, Ohio, et al.*, 126 Ohio St. 140, 184 N.E. 112 (1933); *In the Matter of the Complaint of Curtis and Phillis Petersen, by State Farm Fire & Casualty Company as subrogee v. The Cleveland Electric Illuminating Company*, Case No. 03-832-EL-CSS, Entry (June 10, 2003); *In the Matter of the Complaint of the Erie Insurance Company v. American Electric Power, Inc.*, Case No. 01-2725-EL-CSS, Entry (November 20, 2001). The Commission will allow any of the complaints by insurance companies in the consolidated cases to be appropriately amended, within 14 days of the date of this entry.

- (54) The BMW complainants included, among the respondents, one hundred unnamed respondents. As a creature of statute, the Commission has only that jurisdiction which is granted to it. Inasmuch as the BMW complainants have given the Commission no grounds to believe the unnamed individuals either are public utilities or are otherwise designated by statute for regulation by the Commission, the unnamed persons will be dismissed as party respondents.
- (55) One final issue relating to standing of the complainants arises in the Kucinich case. There, Coalition and Consumers seek to intervene or, apparently, based on their filing of both a motion for intervention and what purports to be a secondary "complaint," to become complainants together with Mr. Kucinich. It is unclear from the face of the "complaint" whether these groups intend to complain only on their own behalf or also on behalf of their members, as the "complaint" filed by the groups recites the impact of the blackout on their members. The Kucinich respondents argue that an advocacy group should not be permitted to pursue a claim on behalf of unnamed members. The Kucinich respondents suggest several rationales for their argument, including the fact that this approach would allow the practical equivalent of a class action. Coalition and Consumers respond that they are complaining on their own behalf.
- (56) The Commission's rules do not allow for the filing of a second complaint in an ongoing proceeding, by unrelated entities. Therefore, the "complaint" by Coalition and Consumers should

be dismissed without prejudice. In the event the Coalition and Consumers choose to file a separate complaint, such complaint should clearly set forth that such complaint is made on behalf of the groups and that such groups are the real parties in interest. In the event that Coalition and Consumers desire to arrange for the filing of a complaint by any of their members, then such members shall be specifically named as complainants. As was discussed previously in the S.G. Foods case, the Commission does not have the authority to hear class action complaints (see finding 7). With regard to the motion to intervene filed by Coalition and Consumers, the Commission will not rule until it is determined whether or not the Kucinich complaint will be dismissed.

Jurisdiction over Respondents

- (57) Among the various respondents in the consolidated cases are holding companies and regional transmission organizations. As discussed above, the Commission has jurisdiction to hear complaints against public utilities in the state of Ohio, as such term is defined in Section 4905.02, Revised Code. Regional transmission organizations such as PJM and MISO are specifically excluded from the definition, under Section 4905.03(A)(4), Revised Code. Holding companies such as FE and AEP are not engaged in the business of supplying electricity to consumers and, thus, are not subject to our jurisdiction for purposes of service-quality complaints. Companies that are in the business of providing power in states other than Ohio are also not within the definition of a "public utility" and are, also, outside of our jurisdiction. Therefore, each of these respondents should be dismissed. Appropriate amendment of complaints to substitute correct entities as respondents will be permitted within 14 days following the issuance of this entry. The Commission also notes that, in certain of the cases, the complainants have moved to dismiss such parties as respondents. Those motions will be granted.

Admissibility of Evidence

- (58) In a prehearing conference on October 5, 2004, the S.G. Foods complainants informed the attorney examiner and the S.G. Foods respondents that they intend to introduce the task force report into evidence without the testimony of any witness. In

light of that intention, the S.G. Foods respondents filed a Motion to Exclude Evidence, together with a supportive memorandum (S.G. Foods motion to exclude). In that motion to exclude, the S.G. Foods respondents ask that the Commission (a) preclude the admission of the task force report and (b) preclude any expert from rendering opinions based upon the task force report.

- (59) With regard to the preclusion of the task force report itself, the S.G. Foods respondents state that the S.G. Foods complainants intend to use only the task force report, without presenting any live witnesses, "to make [their] case of inadequate service." They suggest that the task force report would be hearsay, as it is proposed to be used. They assert that such hearsay would be inadmissible if it does not fall within any exception to the hearsay rules.
- (60) Before continuing to summarize the arguments of the parties, the Commission would note that, under the Ohio Rules of Evidence, hearsay is not admissible as evidence in a court of law unless it falls under an exception. Rules 802, 803, Ohio Rules of Evidence (ORE). Rule 803, ORE, sets forth numerous exceptions, including one, Rule 803(8), related to public records and reports. That exception provides for the admissibility of the following:

Records, reports, statement, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

The model rules of evidence, and those adopted in most other jurisdictions, including the rules for federal courts, also include one other subsection which is not in place in Ohio. Under Rule 803(8)(c) of those model rules, admissible government documents also include, "factual findings resulting from an investigation made pursuant to authority granted by law." Such investigative reports are generally held not to be admissible in

Ohio courts. *Cincinnati Insurance Co. v. Volkswagen of America, Inc.*, 41 Ohio App. 3d 239 (Franklin Cty. 1987); *State v. Humphries*, 79 Ohio App. 3d 589 (Clermont Cty. 1992); *Pool v. Wade*, 115 Ohio App. 3d 449 (Lucas Cty. 1996).

- (61) The S.G. Foods respondents argue that the task force report should be excluded because it does not fall within the hearsay exception set forth in Rule 803(8), ORE, inasmuch as (a) the task force itself was not a public office or agency, (b) the statements in the task force report do not relate to matters observed pursuant to a duty imposed by law as to which matter there was a duty to report, and (c) the circumstances underlying the task force report indicate a lack of trustworthiness.
- (62) On October 25, 2004, the S.G. Foods complainants filed a memorandum in opposition to S.G. Foods respondents' motion (complainants' memorandum contra). S.G. Foods complainants argue, *inter alia*, as follows:
 - (a) The Commission is not bound by rules of evidence. The S.G. Foods complainants explain that hearsay rules are designed to exclude evidence, not because it is not relevant or probative, but because of concerns regarding jurors' inability to weigh evidence appropriately. This concern, according to the S.G. Foods complainants, is inapplicable to administrative proceedings before the Commission (S.G. Foods complainants' memorandum contra at 9-12).
 - (b) The S.G. Foods complainants assert that the task force is a public office or agency (S.G. Foods complainants' memorandum contra at 13-16).
 - (c) The task force report does set forth matters observed pursuant to a duty imposed by law as to which there was a duty to report, according to the S.G. Foods complainants (S.G. Foods complainants' memorandum contra at 16-20).
 - (d) The S.G. Foods complainants stress their belief that the task force report is trustworthy (S.G. Foods complainants' memorandum contra at 20-22).

- (63) On October 29, 2004, the S.G. Foods respondents filed a reply memorandum (S.G. Foods respondents' reply), attempting to rebut the S.G. Foods complainants' arguments on four points:
- (e) The S.G. Foods respondents contend that, while case law does state that the Commission is not strictly bound by the rules of evidence, it does routinely apply those rules (S.G. Foods respondents' reply at 4-6).
 - (f) According to the S.G. Foods respondents, there is no solid legal authority establishing the task force as a public office or agency under both Canadian and U.S. law. Rather, S.G. Foods respondents contend that a task force can not "be considered a public agency when it includes private individuals and relies on the work of nongovernmental entities" (S.G. Foods respondents' reply at 7-12).
 - (g) The S.G. Foods respondents reason that the task force report is an evaluative report and is therefore not admissible under Rule 803(8)(b), ORE (S.G. Foods respondents' reply at 12-18).
 - (h) Finally, the S.G. Foods respondents argue, again, that the task force report lacks indicia of trustworthiness and reliability (S.G. Foods respondents' reply at 18-24).
- (64) As noted by both the S.G. Foods complainants and the S.G. Foods respondents, the Commission is not strictly bound by rules of evidence. *Greater Cleveland Welfare Rights Org., Inc. v. Pub. Util. Comm.*, 2 Ohio St.3d 62 (1982). The respondents argue that, in fact, the Commission does follow rules of evidence with regard to hearsay. However, this is not always the case. When the Commission has deemed it appropriate, it has allowed the admission of hearsay testimony. For example, in the hearing on *In the Matter of the Complaint of WorldCom, Inc., et al. v. City of Toledo*, Case No. 02-3207-AU-PWC, *et al.*, hearsay testimony by representatives of the city of Toledo was admitted, over objection by other parties. Clearly, the Commission does not always follow the rules of evidence strictly. However, we do find the rules of evidence to be instructive and, therefore, appropriate for consideration.

- (65) In order to rule that the task force report is admissible under Rule 803(8), ORE, as an exception to the hearsay exclusion, quoted above, we must find (a) that the task force itself is a "public office or agency," as that term is used in the rule, (b) that the task force report fits under one of the rule's subsections, and (c) that other information or circumstances do not indicate a lack of trustworthiness.
- (66) According to the task force report, the task force was assembled under the direction of President George Bush of the United States and Prime Minister Jean Chrétien of Canada. Its report was submitted to the president and the prime minister by the U.S. Secretary of Energy and the Canadian Minister of Natural Resources. While testimony and data of various types may have been received from sources outside of any branch of government, a review of the members of the task force and its working groups shows that almost every listed member is a governmental employee. Those members include representatives of the office of the President; the department of homeland security; the department of energy; the federal energy regulatory commission; the nuclear regulatory commission; the federal bureau of investigation; various states' utilities commissions, environmental departments, security offices, and information technology departments; and similar organizations on the Canadian side. Task Force Report at 1 and at Appendix A.
- (67) Little case law exists regarding the issue of whether an ad hoc committee established for a particular purpose is a "public office or agency." The most helpful judicial discussion of the issue is found in *Wetherill v. University of Chicago*, 518 F. Supp. 1387 (N. Dist. Ill. 1981), where the parties debated the admissibility of the report of an ad hoc task force established by the United States Department of Health, Education and Welfare. The task force in that case was comprised of a group of doctors and experts employed with various departments of the federal government. "In addition to the task force members themselves, a large group of consultants participated actively in preparing the Report. That consultant group consisted of both doctors and non-professionals, several of whom were active in organized efforts to expose the allegedly harmful effects of [a chemical]." *Wetherill* at 1388. The court found the report not to be admissible on other grounds but did discuss the question of

whether this group fell within the parameters of the rule. "Because other requirements of the Rule are not satisfied . . . this Court does not deal with the question whether the Report was the product of a 'public office or agency' within the Rule's meaning or purpose. Under the circumstances of the Report's compilation and in view of the input from nongovernmental sources, that issue is also open to some doubt." *Wetherill* at 1389.

- (68) Applying the *Wetherill* court's concerns to the task force report relating to the blackout yields different results. As discussed above, the members of the task force and its working groups are almost entirely government employees. Although the task force received comments from numerous members of the public, the task force report appears to have been written by the task force members, not by outside consultants. (Task Force Report at Appendix B.) Therefore, the concerns expressed by the *Wetherill* court do not appear to be applicable. The fact that it is an ad hoc group, comprised of members of many state, federal and Canadian governmental entities and including some members from outside of government, does not change its essential characteristic as a governmental organization. The task force, based on its composition and establishment, does not appear to have any motive for conducting the studies other than to inform the public fairly and adequately. In light of the structure of the task force, the manner of its creation, and its mode of operation, as described in the task force report and the memoranda filed by the parties, the Commission finds that the task force falls within the rule's requirement that a document be the work of a "public office or agency."
- (69) Our second step is to determine whether the task force report falls under either of the two categories recognized as exceptions to the hearsay rule by Ohio's Rule 803(8), ORE. The first category allows the admission of reports of the "activities" of an office or agency. The task force report is clearly more than a simple recitation of the activities of the task force and, therefore, is not admissible under subsection (a) of the rule.
- (70) Subsection (b) is broader in scope than subsection (a), allowing the admission of "matters observed pursuant to duty imposed by law as to which matters there was a duty to report" However, courts in Ohio have held that "evaluative and inves-

tigative" reports are not admissible under subsection (b). *Pool v. Wade*, 115 Ohio App. 3d 449 (Lucas Cty. 1996); *State of Ohio v. Humphries*, 79 Ohio App. 3d 589 (Clermont Cty. 1992); *Cincinnati Insurance Company v. Volkswagen of America, Inc.*, 41 Ohio App. 3d 239 (Franklin Cty. 1987). Although such reports might be admissible under subsection (c) in federal courts and in other state jurisdictions, that subsection was intentionally omitted from the rules of evidence adopted in Ohio. Rule 803(8), ORE (staff notes). The Commission, in reviewing the task force report, finds that it covers substantially more than just factual information. In addition, the task force report includes numerous conclusions about causation of the black-out. Thus, the Commission finds that the task force report is an "evaluative and investigative" report and is therefore not admissible under subsection (b) of Rule 803(8), ORE, as an exception to the exclusion of hearsay.

- (71) In summary, the Commission is presented, as described above, with the question of whether to admit the task force report as an exception to the exclusion of hearsay. The Commission finds that, in this circumstance, it is appropriate to rely on the Ohio rules of evidence. Therefore, the Commission will not allow admission of the task force report as a hearsay exception. The Commission is not making a determination as to whether there may be other circumstances under which the task force report might be admissible.
- (72) The S.G. Foods respondents also moved for a ruling that expert testimony on the basis of the task force report be prohibited. As the Commission has no information as to what testimony might be presented or how the task force report might be used, we find that it is premature to rule on this motion. The Commission would, however, direct the attorney examiner assigned to these proceedings to establish a procedural schedule that will allow time for a review of any expert testimony with regard to this issue prior to the hearing on the matter.

Respondents' Motions to Dismiss

- (73) On September 6, 2005, the Triple A respondents filed a motion to dismiss the Triple A complaint on the bases that ATSI has no contractual relationship with Consolidated Edison (who allegedly failed to transmit power to the complainant) and that a

non-customer complainant cannot bring a claim predicated on a public utility's alleged failure to serve its customers. As we discussed above, complaints by persons who are not Ohio customers or consumers will be dismissed on jurisdictional grounds. However, we have allowed a period for amendment of the various consolidated complaints in order to correct this jurisdictional deficiency. If the Triple A complaint is not so amended, then the motion to dismiss will be granted.

- (74) On January 13, 2006, the respondents in the Allianz, Lexington, and Triple A cases filed motions to dismiss those complaints. Although each of such motions is specific to each case, the arguments are similar. Therefore, the Commission will discuss them as a group, where possible.
- (75) In the motions to dismiss the Lexington and Allianz cases, the respondents argue that a subrogation claim may not be brought before the Commission. The issue of subrogation and proper pleading procedure was previously discussed. The motions to dismiss on this ground will not be determined, pending the possible amendment of the complaints.
- (76) In the motions to dismiss the Lexington and BMW cases, the respondents argue that claims may not be filed by noncustomers. This issue was also discussed above. The motions to dismiss on this ground will not be determined, pending the possible amendment of the complaints.
- (77) In the motion to dismiss the BMW complaint, the respondents argue that the complaint by unidentified complainants must be dismissed. We have previously stated that amendment of the complaint will be allowed. The motion to dismiss on this ground will not be determined, pending the possible amendment of the complaint.
- (78) In the motions to dismiss the Lexington, Allianz, and BMW complaints, the respondents suggest that the complaints be dismissed as failing to state reasonable grounds for relief. They assert, *inter alia*, that there is no violation of the Section 4933.81 or 4933.83, Revised Code, requirement for the provision of adequate facilities; there can be no showing of inadequate service on the basis of one outage; there are insufficient allegations of specific facts that would constitute inadequate service; and the complaints seek relief that is contrary to public policy. The

Commission finds that the resolution of these issues requires the development of an evidentiary record. The motions to dismiss on these bases will be denied.

It is, therefore,

ORDERED, That the S.G. Foods complaint against FirstEnergy Corp. be dismissed. It is, further,

ORDERED, That the motion by ATSI, OE, and CEI for an order precluding the admission of the task force report into evidence at the hearing in these proceedings, as a hearsay exception, under Rule 803(8), ORE, be granted. It is, further,

ORDERED, That the motion, in the S.G. Foods case, by ATSI, OE, and CEI for an order precluding expert testimony based on the task force report be deferred for future consideration. It is, further,

ORDERED, That the Miles complaint against FirstEnergy Corp. be dismissed. It is, further,

ORDERED, That the Miles complaint should be amended to clarify the identification of the complainants and the nature of their complaints, as discussed in this entry. It is, further,

ORDERED, That the Allianz complaint be amended to name, as complainants, the insured entities who are real parties in interest, as discussed in this entry. It is, further,

ORDERED, That the Allianz complaint against Metropolitan Edison Company, Jersey Central Power and Light Company and the Pennsylvania Electric Company be dismissed, pursuant to the Allianz complainants' notice of voluntary dismissal of such entities. It is, further,

ORDERED, That the Allianz complaint against FirstEnergy Corp. be dismissed. It is, further,

ORDERED, That the Allianz respondents' motion to dismiss the complaint against all other respondents be denied in part and deferred in part. It is, further,

ORDERED, That the Lexington complaint be amended to name, as complainants, the insured entities who are real parties in interest, as discussed in this entry. It is, further,

ORDERED, That the Lexington complaint against Metropolitan Edison Company, Jersey Central Power and Light Company and the Pennsylvania Electric Company be dis-

missed, pursuant to the Lexington complainants' notice of voluntary dismissal of such entities. It is, further,

ORDERED, That the Lexington complaint against FirstEnergy Corp. be dismissed. It is, further,

ORDERED, That the Lexington respondents' motion to dismiss the complaint against all other respondents be denied in part and deferred in part. It is, further,

ORDERED, That the BMW complaint should be amended to clarify the identification of the complainants and the nature of their complaints, as discussed in this entry. It is, further,

ORDERED, That the motion by the BMW complainants to dismiss the complaint against AEP, MISO, and PJM be granted. It is, further,

ORDERED, That the BMW complaint against FirstEnergy Corp., Pennsylvania Power Company, and one hundred unnamed respondents be dismissed. It is, further,

ORDERED, That the BMW respondents' motion to dismiss the complaint against the remainder of the respondents be denied in part and deferred in part. It is, further,

ORDERED, That the Triple A complaint against FirstEnergy Corp. be dismissed. It is, further,

ORDERED, That the Triple A complaint should be amended to clarify the identification of the complainant and the nature of the complaint, as discussed in this entry. It is, further,

ORDERED, That determination of the Triple A respondents' motion to dismiss the complaint against the remainder of the respondents be postponed pending possible amendment of the Triple A complaint. It is, further,


ORDERED, That the Kucinich complaint should be amended to clarify the identification of the complainant and the nature of his complaint, as discussed in this entry. It is, further,

ORDERED, That the Kucinich complaint against FirstEnergy Corp. be dismissed. It is, further,

ORDERED, That the purported complaint by Coalition and Consumers be dismissed. It is, further,

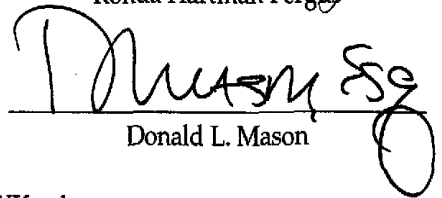
ORDERED, That a copy of this entry be served upon all parties of record.

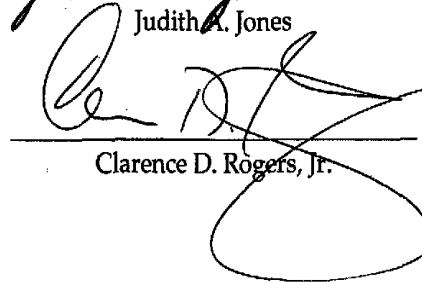
THE PUBLIC UTILITIES COMMISSION OF OHIO


Alan R. Schriber, Chairman


Ronda Hartman Fergus

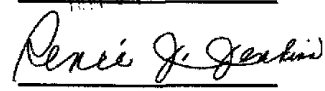

Judith A. Jones


Donald L. Mason


Clarence D. Rogers, Jr.

JWK;geb

Entered in the Journal

MAR 07 2008

Renee J. Jenkins
Secretary