



and PG have been operating under the terms of this agreement since entering into it, and no controversies have arisen regarding the parties' performance pursuant to this contract or the suitability of the contract to address the treatment of discovery material.

On July 1, 2004, after negotiation, acceptance, and nearly two years of operation under the confidentiality agreement currently in place between the AG and PG, PG filed a Motion for a Protective Order that, if granted, would unilaterally change prescribed treatment of confidential information in this proceeding. The Protective Order requested by PG in its Motion would apply to all information produced to date and in the future in this proceeding and would make a blanket confidential designation of more than 100,000 pages of documents produced since March, 2004 including:

- Blank sheets of paper;
- Articles from trade publications;
- Publicly filed testimony;
- Documents that do not respond to discovery requests, such as correspondence between attorneys, a concordance associating Bates numbers, document box numbers, and employee files;
- Stale market data;
- Information on expired contracts;
- Information on transactions with defunct companies;
- Information relating directly to the procurement practices and costs of Peoples Gas that the PUA requires be examined in a public proceeding.

A mechanical designation of all of these documents as confidential is nearly conclusive evidence that PG has not made a good faith demonstration, as is required by the protective agreement in place between PG and the AG, and by the ICC rules of practice, (83 Ill. Adm. Code 200.25) that the designated information actually warrants confidential treatment. In fact, PG has declined even to provide the Commission with any assurance that it believes all the

discovery stamped “Confidential,” which other parties now hold under special protections, meets the legal definitions of privileged or proprietary.

On July 13, the ALJ convened a status hearing to discuss, among other matters, PG’s Motion for a Protective Order. During this status hearing the ALJ distributed a Proposed Protective Order authored by the ALJ, and directed parties to file responses to it by July 20 in preparation for another status hearing to be held on July 21.

### **Summary of Argument**

The ALJ’s Proposed Protective Order should not be entered and PG’s Motion for a Protective Order should be denied for the following reasons: 1) a Protective Order is not necessary in light of the existing protective agreement between the AG and PG; 2) no violations of the protective agreement in place between PG and the AG have occurred or have been alleged; 3) The ALJ’s Proposed Protective Order is legally deficient in that it does not require PG to demonstrate the need for confidential treatment through an evidentiary showing before such treatment is afforded to information produced; 4) the AG will be prejudiced if the ALJ’s or PG’s Proposed Protective Order is entered. If the ALJ does enter a protective order, that order should not substantially change the rights and obligations of the AG and OG as defined by the protective agreement currently in place. Such a Proposed Protective Order is attached to this pleading. (Attachment A)

## ARGUMENT

### **I. A protective order is not necessary in light of the existing protective agreement between the parties.**

The ALJ's Proposed Protective Order treats these proceedings as if there are no protections for confidential information in place and some protective measures are necessary to fill the void. This is not the case. A comprehensive protective agreement that is the product of negotiations between the AG and PG is currently in effect. PG has not alleged that the protective agreement between the AG and PG is inadequate. Both PG and the AG have been conducting discovery pursuant to the terms of this agreement since it was signed in October 2002. PG's observance of the agreement is evidenced by dozens of letters sent from PG to the AG throughout the course of this proceeding accompanying discovery material. These letters state that the discovery material is produced, "pursuant to the protective agreement in place between Peoples Gas and the Illinois Attorney General's Office." See Attachment B. The protective agreement is a valid contract under Illinois law, binding on both the AG and PG and remains in effect today.

The existing protective agreement provides PG the opportunity to designate information as confidential, and provides the AG with a mechanism and standards for challenging such designations. The agreement specifically assigns rights and burdens during various stages of a disagreement over confidentiality. Importantly, the agreement specifies that PG has the burden to demonstrate the necessity of confidential treatment rather than the AG having the burden to demonstrate that documents designated as confidential are not entitled to such treatment. Additionally, the agreement specifies that PG

maintains all existing legal rights to seek redress if the terms of the agreement are violated.

**A. No violations of the protective agreement in place between PG and the AG have occurred or have been alleged.**

In addition to providing a framework for confidential treatment and disputes over confidential designations, the existing confidentiality agreement between the AG and PG provides sufficient protection for documents designated as confidential. This sufficiency is evidenced by the fact that during the time that the protective agreement has been in effect, no information designated as confidential by PG has been disclosed. Indeed, the agreement is currently providing a framework for resolving a dispute that recently arose between the AG and PG regarding PG's designation of certain information as confidential. Since the confidentiality agreement in effect between the AG and PG satisfactorily<sup>1</sup> defines the rights and obligations of both PG and the AG, there is no need for the Protective Order that the ALJ has proposed or the one that PG seeks.

**B. No reason has been offered to void the valid contract that exists between the AG and PG.**

The Protective Agreement between the AG and PG covers all documents, whether paper or electronic, that PG produces in this proceeding. The only rationale supporting PG's Motion for Protective Order is PG's allegation that documents it intended to produce in response to certain discovery requests were

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<sup>1</sup> The fact that the agreement is the product of negotiation between the parties demonstrates that the agreement is satisfactory to both parties.

electronic, and that “because of the ease with which electronic documents can be disseminated” a Protective Order was needed. PG Motion at para. 5.

This reasoning does not support additional protections of any kind. Peoples has produced numerous documents in electronic form to date in this proceeding. No dissemination of these documents has occurred. Moreover, any paper document can be scanned into electronic format and disseminated just as easily as any other electronic document. Additionally, documents in paper format can easily be disseminated via fax or photographic reproduction.

More importantly, the rationale which Peoples provides in support of its Motion has no basis in law whatsoever. The Commission’s Cass standard for confidential protection, which is described in more detail below, does not cite “ease of dissemination” as a basis for confidential treatment. Much as Peoples would prefer to premise its Motion on the possibility that any of the discovery responses it has so far provided may actually be disseminated, both the AG and Peoples considered that possibility almost two years ago and entered into Protective Agreements to avert such an event. Nothing in Peoples’ Motion explains why, after several years, “ease of dissemination,” never a concern in the past, suddenly necessitates additional protections so harsh that the existing Protective Agreement does not address them.

PG has not alleged that the AG has disseminated any documents, paper or electronic, produced in the proceeding to date and the AG has not done so. Accordingly, PG’s reason for seeking additional protections for electronic documents it intends to produce does not support granting the additional protective measures requested.

**II. The ALJ's Proposed Protective Order is legally deficient in that it does not require PG to demonstrate the need for confidential treatment before such treatment is afforded to information produced.**

The standard for affording confidential treatment for information produced in Illinois Commerce Commission ("ICC") proceedings is set out in the Commission's Order in *Cass Long Distance Services, Inc.*, 1999 Ill. PUC LEXIS 206, ICC Dkt. No. 96-0060 (Reopen), 1999 ("Cass"). In Cass, the Commission determined that information to be produced in a Commission proceeding can be afforded confidential treatment if:

- disclosure of it will harm the collecting entity's<sup>2</sup> ability to receive such information in the future or,
- if the potential for disclosure will cause the company required to provide the information to avoid the business that requires such provision,
- the company that is the source of the information faces competition, and
- disclosure of the information will cause actual competitive harm.<sup>3</sup>

In order for information to be protected from disclosure, the entity seeking protection must "show by specific factual or evidentiary material" that:

- the person or entity from which the information was obtained faces actual competition, and

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<sup>2</sup> In *Cass*, the collecting entity was the ICC.

<sup>3</sup> Cass at 37, 41; See *Cooper v. Department of the Lottery*, 266 Ill.App.3d 1007 (1994); *Bowie v. Evanston Community Consol. Sch. Dist.*, 128 Ill.3d 373, 378 (1989); Cass Order at 13, quoting *Calhoun v. Lyng*, 864 F.2d 34, 36 (5th Cir. 1988); *National Parks and Conservation Assoc. v. Morton*, 498 F.2d 765, 770 (1974).

- substantial harm to a competitive position would likely result from disclosure of the information.

The standard for confidential treatment contained in the ALJ's Proposed Protective Order requires far less in order for information to be protected than the standard adopted by the Commission in Cass. The ALJ's proposed order defines proprietary material and information as "any information about Peoples Gas Light and Coke Company, ("Peoples") or an affiliate of Peoples, that, if revealed in a competitive setting, would cause harm to Peoples or an affiliate." ALJ Proposed Protective Order at 1. Under the proprietary standard contained in the ALJ's Proposed Protective Order, Peoples can have information protected if it claims that disclosure in a competitive setting will cause any harm to Peoples or an affiliate. Furthermore, under the ALJ's proposed protective agreement, all information produced after February 10, 2004 is considered proprietary and protected as such unless that protection is challenged. This application of the proprietary standard contained in the ALJ's Proposed Protective Order is at odds with the Cass requirements for the following reasons:

- no showing by specific factual or evidentiary material is required in order for information to be considered confidential;
- there is no requirement that PG faces actual competition;
- there is no requirement that disclosure of information for which confidential treatment is sought would be harmful to PG's competitive position;
- there is no requirement that harm that PG would face due to disclosure of information for which confidential treatment is sought would be substantial.

Indeed, though Cass clearly requires PG to make an evidentiary showing in order to have information protected, the Parties are considering a broad protective order before PG has even specifically identified the information it seeks to have protected, let alone made any evidentiary showing to demonstrate that such protection is justified.

Additionally, the Commission's Cass requirements expressly state that a company's preference for confidential treatment or customary confidential treatment is an insufficient basis for confidential treatment and that the test for determining if information is entitled to protection is an objective test. Cass Order at 41.

The ALJ's Proposed Protective Order also extends to information provided regarding People's affiliates. The Cass standards that apply to PG in this case also apply to other entities for which protection of information provided is sought. For those affiliates and related entities that are no longer operating, the Cass standard clearly does not entitle their information to protection since, as non-operating entities, they can't possibly face competition.<sup>4</sup>

Additionally, the ALJ's Proposed Protective Order contemplates a monetary penalty for violation of its terms. It may be necessary to obtain parties' agreement to the Draft Order, since the ICC does not generally enjoy the power to impose costs, fines, and penalties under the Public Utilities Act. See, e.g., 220-ILCS 5/5-202.

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<sup>4</sup> PG's affiliates and related entities that are no longer operating include MidWest Energy Hub and enovate.

In summary, the ALJ's Proposed Protective Order contains a definition of proprietary material that is far less demanding than the standard adopted by the ICC in Cass for affording proprietary treatment to information produced in Commission proceedings.

### **III. The AG will be prejudiced if PG's Proposed Protective Order is Granted.**

If the ALJ's Proposed Protective Order is entered, the AG will be prejudiced by having to operate under different, less favorable, and more burdensome rights and obligations with regard to the designation and treatment of confidential information. Either the ALJ's or PG's Proposed Protective Order, if adopted, will interfere for no lawful reason, with the valid protective agreement in effect between the AG and PG by establishing terms for designation and treatment of confidential information that conflict with terms contained in the agreement currently in effect. These conflicts will prejudice the AG by having the effect of "resolving", in PG's favor, an ongoing discovery dispute between the AG and PG that is currently being conducted under the framework agreed upon between the AG and PG and contained in the existing protective agreement.

Furthermore, the ALJ's Proposed Protective Order's definition of proprietary is just as sweeping in its scope ("any document") and effects as Peoples Gas' universal application of the "Confidential" designation. The Draft Order's broad scope means that Peoples Gas would unavoidably, and inappropriately, be involved in almost every aspect of the trial preparation of other parties' cases. Even for items whose non-privileged and non-proprietary nature cannot reasonably be disputed, parties must, at every turn, invite counsel for Peoples Gas to review the documentary bases (and, as a result, the strategic

work-product) for their developing cases. This compulsory exposure of attorneys' privileged activities, for information never shown or even claimed to be privileged or proprietary, is a serious flaw in the procedure defined by the Draft Order, one that cannot be justified.

Additionally, the special treatment of all documents produced since February 10, 2004 that the ALJ's Proposed Protective Order would require imposes practical constraints on attorneys and experts who must use the information to prepare for trial. These constraints will be exacerbated by a likely flood of precautionary requests for approval pursuant to the Draft Order because everything is (in effect) presumed to be protected, because it is necessary to avoid a time crunch, and simply because the final content of parties' testimony is rarely set long before filing. That unavoidable fall-back strategy will disrupt the trial preparations of Peoples Gas and of the other parties. In sum, the proposed pre-approval process shows many signs of being unworkable.

Finally, the ALJ's Proposed Protective Order imposes the burdens of special protection for privileged or proprietary information for a 5-year period. Whatever the outer bounds permitted under Illinois case law, the Commission's Rules of Practice have established a presumptive 2-year limitation on such special handling requirements.<sup>5</sup> 83 Ill. Adm. Code 200.430. Without some evidentiary showing that a longer period is appropriate, and there has been no showing here of any need whatever, a longer period would be contrary to established Commission policy.

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<sup>5</sup> "If no date is specified, the proposed expiration date for the proprietary status of the data, information or studies shall be two years from the date of submission." 83 Ill. Admin. Code 200.430.

**IV. If the ALJ enters a proposed order, that protective order should contain provisions and protections similar to, and no less favorable to the AG, than the provisions and protections contained in the protective agreement currently in place between the AG and PG.**

If the ALJ does enter a protective order, that protective order should not substantially change the rights and obligations that currently apply to PG and AG with regard to designation and treatment of confidential information in this case. The attached Proposed Protective Order contains such similar provisions and protections.

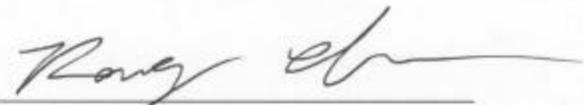
**CONCLUSION**

WHEREFORE, the People of the State of Illinois respectfully request that the ALJ not enter the ALJ's proposed motion for a protective order in this proceeding. In the alternative, if the ALJ does enter a protective order, the People of the State of Illinois respectfully request that the AG enter the attached Proposed Protective Order.

Dated: July 20, 2004

Respectfully submitted,

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