

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission)	
On Its Own Motion)	
)	
vs.)	Docket 01-0707
)	
The Peoples Gas Light and Coke Company)	
)	
Reconciliation of revenues collected)	
under gas adjustment charges with)	
actual costs prudently included.)	

**JOINT REPLY OF THE CITIZENS UTILITY BOARD, THE CITY OF CHICAGO, AND
THE PEOPLE OF THE STATE OF ILLINOIS TO
THE RESPONSE OF THE PEOPLES GAS LIGHT AND COKE COMPANY TO
STAFF WITNESSES' MOTION FOR FORMAL DISCOVERY**

Pursuant to Section 200.190 of the Rules of Practice (“the Rules”) of the Illinois Commerce Commission (“the Commission”) and the schedule set by the Administrative Law Judge (“ALJ”) in her Notice of October 8, 2004, the Citizens Utility Board (“CUB”), the City of Chicago (“the City”), and the People of the State of Illinois by Attorney General, Lisa Madigan (“AG”), (collectively “Governmental and Consumer Parties” or “GCP”), submit this Reply to the Response of The Peoples Gas Light and Coke Company (“Peoples”) to the Staff Witnesses’ Motion for Formal Discovery.

Background

On October 7, 2004, the Staff Witnesses (“the Staff”) filed a Motion for Formal Discovery (“the Motion”) seeking to take the depositions of a number of Peoples’ employees, employees of Peoples’ affiliates, and employees of Enron North America and its affiliates. Peoples filed its Response to Staff’s Motion (“the Response”) on October 14, 2004.

Introduction

The ALJ should grant the Staff’s Motion in its entirety. The Staff and the GCP share a common interest in obtaining “full disclosure of all relevant and material facts” to this

proceeding, pursuant to the Commission's policy on discovery. The ALJ should reject the limitations Peoples seeks to impose on the depositions because they are unwarranted and contradict the purpose of depositions, in particular, and discovery in general. Contrary to Peoples' argument, deposing company witnesses is an entirely proper use of discovery depositions as recognized by the Rules of Illinois Supreme Court. Finally, Peoples' request that the Staff and any parties planning to participate in the depositions identify or tender to Peoples the documents they wish to use during those depositions seeks impermissible discovery of attorney work product.

Argument

I. Deposing Company Witnesses Is an Entirely Proper Use of Discovery Depositions

Staff, through its Motion, seeks to take the depositions of a number of employees of Peoples and its affiliates, including some who have testified in this proceeding. Specifically, the Staff seeks to depose Messrs. de Lara, Wear, and Zack who have offered direct, additional direct, or rebuttal testimony. Motion at 14-15.

However, Peoples has objected to Staff's request and argued that: "a discovery deposition at this time would be tantamount to conducting cross-examination of those witnesses, which is properly done at the hearing." Response at 2. Peoples further argued that this would be "an inappropriate use of a discovery deposition" constituting "potential delay" and "an inefficient use of resources." *Id.*

The Rules of the Illinois Supreme Court provide clear guidance on this question and defeat Peoples' objection. Rule 202 states: "[a]ny party may take the testimony of *any party of person* by deposition upon oral examination." Ill. Sup. Ct. R. 202 (emphasis added). Also, Rule 206(c)(1) states: "[t]he deponent in a discovery deposition may be examined regarding any

subject matter subject to discovery under these rules. *The deponent may be questioned by any party as if under cross-examination.*” Ill. Sup. Ct. R. 206(c)(1) (emphasis added). Notably, the Supreme Court Rules make no exception for testifying witnesses. Thus, the Staff and GCP may appropriately depose Peoples’ witnesses at this time.

In this proceeding, the ALJ has already recognized the fact that a deposition can yield information likely to lead to admissible evidence more quickly than written interrogatories when she stated during a discussion about depositions that: “[y]ou know, on the other hand, taking a deposition can be a lot faster in terms of getting information in interrogatories.” Sept. 27, 2004 Tr. at 484. Thus, Peoples’ concern with delay and inefficiency arising from Staff’s request to depose its witnesses is misplaced. For these reasons, Peoples’ objection to Staff’s request to depose Peoples’ witnesses lacks any foundation and the ALJ should overrule it.

II. Peoples’ Request that Staff and Any Other Parties Participating in Depositions Identify or Tender Documents It Plans To Use Seeks Impermissible Discovery

Peoples’ requests that Staff and any other parties participating in depositions identify or tender to Peoples the documents that they plan to use in the deposition. The GCP object to this request on the grounds that no Commission Rule or Supreme Court Rule supports Peoples’ position. The GCP further object that Peoples’ request seeks impermissible discovery of work product protected materials.

Peoples has argued that if it does not receive these documents, then the three hours available for deposition “will not be used efficiently.” Response at 4. Peoples has also argued that “[t]his procedure will both facilitate the efficient conduct of discovery and prevent unreasonable disadvantage from presenting deponents with documents with which they are unfamiliar and cannot readily review.” *Id.*

Peoples has failed to cite any authority as a basis for its request that the ALJ direct the Staff and any other parties wishing to participate in depositions to identify or tender to Peoples the documents it wishes to use in the depositions. *Id.* Indeed, Supreme Court Rule 206, Method of Taking Depositions on Oral Examination, which governs the manner in which parties conduct depositions in Illinois, does not grant a deponent the right to receive, ahead of time, documents from the opposing party that it plans to use. Ill. Sup. Ct. R. 206. Nor does the Commission's Rule 360, which governs depositions, provide support for Peoples' novel proposition. 83 Ill. Admin. Code §200.360. Thus, no authority supports Peoples' request, and the ALJ should deny it. Granting Peoples' request would also prejudice the Staff and the GCP by revealing work product protected materials.

Peoples' request, though couched in the language of administrative efficiency, seeks the impermissible discovery of work product protected materials. Illinois Supreme Court Rule 201(b)(2) states: "[m]aterial prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose theories, mental impressions, or litigation plans of the party's attorneys." Ill. Sup. Ct. R. 201(b)(2). The nature of the information Peoples seeks – specific identification of documents that parties intend to use in deposition – unavoidably compels parties to reveal their theories of the case and strategies for litigation. In *Portis v. City of Chicago*, the Seventh Circuit Court of Appeals adopted the 3rd Circuit's analysis of these types of materials and held that such materials constituted protected work product¹. 2004 US Dist. LEXIS 12640 (N.D. Ill. July 7, 2004), *citing Sporck v. Peil*, 759 F.2d 312, 316 (3rd Cir. 1985). Being compelled to specify, from among the thousands of documents produced by Peoples Gas,

¹ In *Sporck*, the issue was whether an attorney's selection and compilation of documents for the client to review in preparation for his deposition constituted opinion work product. *Sporck v. Peil*, 759 F.2d 312, 316 (3rd Cir. 1985). The Third Circuit answered affirmatively, concluding that "[i]n selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case." *Sporck*, 759 F.2d at 316. (emphasis added).

those specific documents that the GCP wish to use in depositions “could not help but reveal important aspects of [our] understanding of the case.” *Id.* at *7. Unlike the Staff and the GCP, Peoples has access to both the documents it has provided in response to discovery requests and the witnesses themselves. Peoples should have known that depositions were a possibility in this proceeding and that it might have to prepare deponents to discuss the documents they produced in response to discovery. Peoples has had ample time to prepare for depositions in this proceeding and does not need the assistance of the Staff and GCP attorneys to prepare its witnesses to answer questions during these depositions. Therefore, the ALJ should deny Peoples’ request on this ground as well.

III. A Discovery Conference and Deadline To Complete Depositions Are Unnecessary at this Time

A discovery conference is unnecessary at this time. The ALJ’s order on Staff’s Motion will likely address the concerns of all parties with respect to the depositions and the manner in which the Staff and the GCP will conduct them. Also, Peoples has not yet initiated reasonable attempts to resolve its differences with the Staff and the GCP over the depositions as required by Illinois Supreme Court Rule 201(k). Ill. Sup. Ct. R. 201(k).

Peoples has also requested that the ALJ impose a deadline of December 3, 2004 to complete all of the depositions. Response at 4. Such a request is premature because Peoples has yet to confer with the Staff and the GCP as to the actual scheduling of the depositions, which will depend on the availability of deponents and attorneys.

Conclusion

WHEREFORE, for the foregoing reasons, the Citizens Utility Board, the City of Chicago, and the People of the State of Illinois, by Attorney General Lisa Madigan, respectfully request that the ALJ grant the Staff Witnesses’ Motion and overrule Peoples’ objections.

Respectfully Submitted,
CITIZENS UTILITY BOARD

By: 
Stephen Y. Wu
Legal Counsel
Citizens Utility Board
208 S. LaSalle, Suite 1760
Chicago, IL 60604
(312) 263-4282
(312) 263-4329 fax
swu@citizensutilityboard.org

CITY OF CHICAGO

By: 
Ronald D. Jolly
Assistant Corporation Counsel
City of Chicago
30 N. LaSalle, Suite 900
Chicago, IL 60602
(312) 744-6929
(312) 744-6798 fax
rjolly@cityofchicago.org

PEOPLE OF THE STATE OF ILLINOIS

By: 
Randolph R. Clarke
Assistant Attorney General
Public Utilities Bureau
100 W. Randolph, 11th Floor
Chicago, IL 60601
(312) 814-8496
(312) 814-3212 fax
rclarke@atg.state.il.us