

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

CITY OF CHAMPAIGN, ILLINOIS )  
 )  
 -v.- )  
 ) Docket No. 05-0599  
 ILLINOIS-AMERICAN WATER COMPANY )  
 )  
 Complaint regarding the water company's )  
 frequent boil orders and practices for notifying )  
 customers. )

**REPLY TO CITY OF CHAMPAIGN'S RESPONSE TO ILLINOIS-AMERICAN  
WATER COMPANY'S REQUEST FOR A PROTECTIVE ORDER**

Illinois-American Water Company ("IAWC"), hereby replies to the City of Champaign's ("Champaign") Response to Illinois-American Water Company's Request for a Protective Order ("Response").

**I. Introduction**

Champaign's Response, in general, inappropriately characterizes IAWC as entirely opposed to Champaign's proposed changes to the Protective Order submitted as Exhibit A ("Protective Order") to IAWC's Motion for Entry of a Protective Order ("Motion"), filed January 24, 2006. This is incorrect. Rather, it is IAWC's position, as discussed below, that those of Champaign's proposed changes that it does not fully agree with are either unnecessary, because the Protective Order already addresses them, or can be implemented in a more reasonable fashion. Champaign further accuses IAWC, without any basis whatsoever, of desiring that this complaint "be litigated behind closed doors rather than in the public." (Resp., p. 10.) This is also not the case. IAWC seeks an appropriate protective order pursuant to Section 4-404 of the Public Utilities Act ("Act"), 220 ILCS 5/4-404, and 83 Ill. Adm. Code Section 200.430 that will allow IAWC to protect documents it must produce in this proceeding that, *inter alia*, may describe critical infrastructure and therefore present a security concern, that reflect commercially

sensitive business information, or that contain personally identifiable customer information that should not be publicized. Champaign's invective is, therefore, unwarranted.

## **II. Agreed Changes**

IAWC agrees with Champaign's proposed language for a new paragraph 3<sup>1</sup>. However, IAWC suggests the following wording to maintain consistency with the defined terms in the rest of the Protective Order:

3. A Party receiving Confidential Information pursuant to this Order does not waive its right to later contest at any time the "confidential" designation made by the Producing Party.

IAWC also agrees with the changes proposed to paragraph 9 of the Protective Order as set out in the Response, page 1 footnote 1.

## **III. The Protective Order Already Excludes Public Documents from Confidential Treatment**

Champaign mistakenly asserts that IAWC's proposed Protective Order would allow treatment of public information as confidential. (Resp., p. 3.) This is not the case. Paragraph 2 expressly defines "Confidential Information" to exclude public information (a fact that Champaign disregards):

2. "Confidential Information" as used herein includes *non-public information* maintained by a Party in confidence in the ordinary course of business and which such Party has a business interest in maintaining in confidence. (Emphasis added.)

Thus, by definition, information designated as confidential under the Protective Order (which the Producing Party has, under paragraph 1, made a good faith legal and factual determination is entitled to confidential or proprietary protection) cannot be information in the public domain. As a result, Champaign's proposed additional language is unnecessary.

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<sup>1</sup> IAWC has attached a redline copy of the Protective Order, showing IAWC's proposed changes, as Exhibit A hereto. IAWC will also serve, with this Reply, a clean copy of the Protective Order reflecting IAWC's proposed language. References in this Reply to paragraphs of the Protective Order refer to the original paragraph numbers set forth in IAWC's proposed Protective Order filed on January 24, 2006.

Although Champaign argues at length that documents in the public domain should not be entitled to a confidentiality designation, a point with which IAWC agrees, Champaign does not explain why its proposed language would improve the Protective Order or otherwise aid in the effective and appropriate protection of confidential information. To the contrary, the language proposed by Champaign is vague and likely to lead to disputes over what it does and does not apply to. For example, the provision in proposed subpart (b) that Confidential Information shall not include information "that entered the public domain subsequent to the time it was produced to the Receiving Party by the Producing Party through no fault of the Receiving Party" does not define what would or would not constitute the "fault of the Receiving Party," nor does it make clear that the Receiving Party must protect such information until the time it enters the public domain. Similarly, the proposed subpart (c) does not define what is meant by "free of any obligation of confidence," nor does its explain how a Producing Party is meant to determine in advance that a Receiving Party already possesses a document "free of any obligation of confidence." Such determinations are better made under the informal resolution component of the Dispute Procedures described below.

Champaign also asserts that IAWC's Protective Order allows IAWC to simply assert a document is confidential and shift the burden to other parties to show that it is not. (Resp., p. 5.) Champaign further asserts that this means that IAWC could designate a public document confidential, thereby making it confidential until the designation is reversed. Neither of these concerns are justified. As discussed above, the Producing Party must in good faith make a legal and factual determination that the information is entitled to confidential or proprietary protection in accordance 83 Ill. Admin. Code Section 200.605. The definition of Confidential Information excludes public information and narrowly defines what Confidential Information can be.

Moreover, as discussed below, the Protective Order expressly places the burden of supporting a confidential designation on the Producing Party. Thus, Champaign's concerns are misplaced.

The Protective Order excludes public information by definition, and Champaign has not explained what benefit there is to its proposed language. In addition, Champaign cites no Protective Orders in other Commission proceedings that use the proposed language. (By contrast, a protective order substantially similar to the Protective Order proposed by IAWC was entered in Dockets 05-0681, 06-0094 and 06-005 (consol.) on May 2, 2006.) Therefore, there is no basis for Champaign's proposed change.

IAWC also notes that some of Champaign's discussion (Resp., pp. 3-5) appears to imply that documents become public once filed with a court. Clearly, this is not the case in Commission proceedings. Section 4-404 of the Act requires the Commission to "provide adequate protection for confidential and proprietary information," and the Commission's rules set forth procedures for both protection of confidential information, 83 Ill. Adm. Code § 200.430, and the filing of confidential documents with the Commission. 83 Ill. Adm. Code §§ 200.605 & 200.1050(b). As a result, Champaign cannot argue that the mere fact that the parties are participating in a Commission proceeding requires that the documents involved be public.

#### **IV. IAWC's Dispute Resolution Language Offers a More Reasonable Alternative to Champaign's Language**

Contrary to Champaign's arguments, IAWC does not dispute that it is the Producing Party's burden to support its confidential designation, and IAWC's proposed Protective Order states exactly that in paragraph 13:

In the event of a challenge to a confidentiality designation by the Producing Party, the Producing Party shall bear the burden to support its designation.

IAWC also does not object to the streamlining of dispute resolution procedures. However, the dispute resolution language proposed by Champaign is flawed in that it allows a Receiving Party,

simply by sending the Producing Party a letter, to require a Producing Party to file a motion with the Commission to ensure continued confidential protection of a document, without any opportunity for the issue to be resolved informally or for the Producing Party to be formally notified of a challenge to a confidential designation. Under Champaign's proposed language, a Receiving Party could force a Producing Party to file a motion seeking confidential protection for every document that it claims confidentiality for. IAWC therefore proposes (but Champaign has rejected) the following language as a reasonable alternative that addresses Champaign's concerns:

13. If a Party does not agree with the Producing Party's designation of documents and information as Confidential Information, such Party (the "Challenging Party") shall notify the Producing Party of its objection and make reasonable efforts to resolve the objection informally. If the Challenging Party continues to object to the confidential designation, it should raise the matter with the Administrative Law Judge(s) in the form of a written notice of objection that shall identify the documents or portions thereof that are the subject of the challenge. Following the filing of the notice of objection by the Challenging Party, the Producing Party shall file a motion, pursuant to 83 Ill. Admin. Code 200.430, within ten (10) business days of the notice of objection, requesting an order granting the documents continued confidential protection. A document designated as Confidential Information shall be treated as such by all Parties during the pendency of any challenge to such designation until the Administrative Law Judge(s) issues a ruling altering such designation. In the event of a challenge to a confidentiality designation by the Producing Party, the Producing Party shall bear the burden to support its designation.

IAWC's proposed language is superior to Champaign's for at least three reasons: (i) it provides an opportunity for informal resolution of disputes; (ii) it requires the Challenging Party to make its objection on the record, which ensures the completeness and accuracy of the record and provides the Producing Party with clear and undisputed notice that it must file a motion if it wishes to continue to support a confidential designation (and, in addition, such notice of objection is no more burdensome than issuing a letter to the producing party); and (iii) it reduces the risk that a Receiving Party could harass a Producing Party with frequent letters challenging confidential designations.

IAWC's proposed language does not, as Champaign suggests (Resp., p. 10), shift the burden of showing that a document is confidential to the Receiving Party. IAWC's Protective Order makes clear that the burden is on the Producing Party. IAWC's proposed language instead sets forth reasonable procedures for resolving disputes about confidential designations.

IAWC's proposed language is consistent with protective orders in other Commission proceedings. The language that IAWC originally proposed in this proceeding was included in the protective order entered by the Administrative Law Judges ("ALJs") in Dockets 05-0681, 06-0094 and 06-0095. Moreover, in the protective order entered August 22, 2006 by the ALJ in Docket 06-0336 ("Docket 06-0336 Protective Order"), a proceeding to which Champaign is a party, the dispute resolution provisions required

7. If counsel for a party opposes the designation of a document as confidential, he shall first make a good-faith effort to resolve such a dispute with counsel for the producing party. If the dispute is not resolved by the parties with reasonable effort and in a timely manner, *the challenging party may file a motion seeking to declassify particular documents*. Such a motion shall briefly describe the attempt at resolving the dispute and the shall specify the documents at issue and any discovery identification numbers, if available. The party seeking confidential treatment shall file a response supporting its confidential designation. Such party also shall provide the documents for in camera inspection by the Administrative Law Judge. The movant may file a reply. The deadlines for filing responses and replies shall follow those for motions generally, as set forth in the Case Management Order (May 24, 2006, at para. 10.). A document designated as confidential shall be treated as such by all parties during the pendency of any challenge to such designation and until the Administrative Law Judge issues a ruling altering such designation. In the event of a challenge to a confidentiality designation, the producing party shall bear the burden to establish that such designation is in accordance with Illinois law. (Emphasis added)

Thus, the Docket 06-0336 Protective Order not only required that the challenging party first seek to resolve any dispute informally, it then required the challenging party file a motion to declassify the challenged document. Such a requirement would be more burdensome to the Challenging Party than the notice of objection filing that IAWC proposes here. (IAWC notes that the Docket 06-0336 Protective Order (paragraph 17) permitted parties to seek modification

of the order, but Champaign sought no modification of the dispute provisions in the Docket 06-0336 Protective Order.) Thus, IAWC's proposed language on dispute resolution is a reasonable approach that is consistent with the approach in other Commission proceedings.

WHEREFORE, for all of the reasons set forth above, IAWC respectfully moves for entry of the Protective Order attached to this Reply as Exhibit A.

February 8, 2007

Respectfully submitted,

ILLINOIS-AMERICAN WATER  
COMPANY

By: /s/ Albert D. Sturtevant

One of its attorneys

Boyd J. Springer  
Albert D. Sturtevant  
JONES DAY  
77 West Wacker Drive  
Suite 3500  
Chicago, IL 60601-1692  
Phone: (312) 782-3939  
Fax: (312) 782-8585  
bjspringer@jonesday.com  
adsturtevant@jonesday.com

Mary G. Sullivan  
Illinois-American Water Company  
727 Craig Road  
St. Louis, MO 63141  
314-996-2287  
Mary.sullivan@amwater.com