STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

NORTH SHORE GAS COMPANY	:	No. 11-0280
	:	
Proposed general increase in rates for gas service.	:	(Cons.)
	:	
THE PEOPLES GAS LIGHT AND COKE COMPANY	:	No. 11-0281
	:	
Proposed general increase in rates for gas service.	:	

THE UTILITIES' REPLY IN SUPPORT OF THEIR CONFIDENTIALITY MOTION

North Shore Gas Company ("North Shore") and The Peoples Gas Light and Coke Company ("Peoples Gas") (together, the "Utilities"), pursuant to the Administrative Law Judges' scheduling ruling of September 20, 2011, hereby file their Reply in Support of Their Verified Motion to Preserve the Confidential Designation of Certain Documents (Revised) (the "Motion"). The Illinois Attorney General's Office (the "AG") filed the sole response to the Motion (the "AG Response"). The AG Response is off target and erroneous. The Motion should be granted

I. Introduction

1. The Utilities filed the Motion on September 8, 2011. The Motion relates to: (1) the rate case expense Schedule C-10s filed as "Part 285" Schedules and also as NS Ex. 6.2 (Confidential) and PGL Ex. 6.2 (Confidential) on February 15, 2011; and (2) roughly 500 pages of rate case expense documents (updated Schedules C-10s, intercompany documents, billing documents, and further information) produced in discovery from March 20, 2011, to August 18, 2011, the vast majority of which, pursuant to a request in Staff's rebuttal, were filed as NS-PGL Ex. 39.9 (Public and Confidential) on August 22, 2011. Motion, ¶¶ 1, 3, 7-9.[1]

[1] The Motion withdrew the Confidential designations as to: (1) the updated Schedule C-10.1s produced as attachments to the Utilities' original, supplemental, and updated responses to Staff data request JMO 10.01 (*see* Motion ¶ 9(d)) (correctly referring to Schedule C-10.1s in the second sentence but incorrectly referring to the Schedule C-10s in the third sentence due to a typographical error); and (2) the attachments to the Utilities' responses to Staff data request JMO 11.07 (Motion ¶ 9(g), fn. 5). The Utilities apologize for the ambiguity due to that typographical error.

2. The AG filed the AG Response on September 14, 2011.

3. Throughout the AG Response, the AG repeatedly confuses and commingles the issues of confidentiality and discoverability, cites almost all off-point authorities, and simply fails to make a persuasive argument. Accordingly, and more specifically, the Administrative Law Judges should grant the Motion and reject the AG Response for the following reasons: (1) contrary to the AG's unsupported and illogical assertion, the Confidential designations at issue do not affect in any way the Illinois Commerce Commission's (the "Commission" or "ICC") ability to determine whether the consultant, witness, and legal fees incurred by the Utilities are just and reasonable; (2) the Utilities have demonstrated proper and reasonable bases for maintaining the Confidential designations at issue; while, in contrast, (3) the AG's other arguments are confused and incorrect, often asserting claims about confidentiality but relying on authorities relating to discoverability, despite the fact that the material in question already was filed / produced. (In addition, the AG's underlying objection was untimely.)

II. The Confidential Designations Do Not Affect the Commission's Ability to Determine Whether the Consultant, Witness, and Legal Fees Incurred by the Utilities Are Just and Reasonable.

4. The AG Response (at ¶¶ 1, 3, 5) claims that the Confidential designations somehow will hamper the Commission's ability to "specifically assess the justness and reasonableness of any amount expended by a public utility to compensate attorneys or technical experts to prepare and litigate a general rate case filing" as provided for under Section 9-229 of the Public Utilities Act (the "Act"), 220 ILCS 5/9-229. However, that argument is flawed and irrelevant here because it confuses discovery with confidential treatment. The issue here is not whether the Utilities have produced sufficient information (they have), but whether their Confidential designations of documents that they did produce are appropriate. The Confidential designations did not prevent production, and the vast majority of the material in question, including all essential information, is

in the evidentiary record, due to, among other things, the Schedule C-10s in NS and PGL Exs. 6.2 (Confidential) and, pursuant to Staff's request, the discovery materials in NS-PGL Ex. 39.9 (Public and Confidential). The AG Response does not and cannot identify any material that was withheld that will interfere with the Commission's fact-finding.

5. For example, the AG Response (at ¶ 3) asserts that "if the confidential designation is allowed, the Commission will be hampered in its ability to specifically address the size and reasonableness of the rate case expense." That is just plain wrong. The Utilities have produced and placed into evidence hundreds of pages of Confidential documents, including detailed billing records with even attorney time entries (only a very small amount of privileged material was redacted)[2] that go far beyond cursory lump sums, from which the Commission can rule on the justness and reasonableness of costs. The AG Response (at ¶ 21) cites *Mars v. Priester*, 205 Ill. App. 3d 1060 (1st Dist. 1990), which involved the insufficient production of information needed to support a fee-shifting request. Setting aside that this is not a fee-shifting situation, as discussed below, the AG does not and cannot cite, however, any needed information that was not in fact produced and put into evidence here. The Utilities have provided the Commission with more than sufficient information to meet its obligation under Section 9-229 of the Act, regardless of the Confidential designations.

6. Indeed, the AG's claim on the foregoing subject is not supported by, and instead is inconsistent with, even its own witness' rebuttal testimony, which expressed no claim of insufficient information. Motion, ¶ 9(l).

[2] The AG's Response does not disagree with the Motion's point that only an extremely limited amount of information was redacted. *See* Motion, ¶ 9(d), (e).

III. The Utilities Have Demonstrated a Reasonable Basis for Maintaining the Confidential Designations at Issue. <u>The AG's Counter-Arguments Are Confused and Incorrect</u>.

7. As explained and shown in the Motion, the documents at issue are Confidential because they meet the definition set forth in the Protective Order, which states that "Confidential" means "non-public information maintained by a party in confidence in the ordinary course of business and in which such party has a business interest in maintaining in confidence." Protective Order, ¶ 2.

8. The Utilities ordinarily maintain such records in confidence, a practice which, in and of itself, indicates the Utilities have a legitimate business interest in maintaining the Confidential designations at issue. Moreover, the Utilities have a genuine business interest in keeping rate case costs low. *E.g.*, Moy Direct, PGL Ex. 6.0, 16:344 – 17:357. By keeping the designated information confidential, the Utilities are afforded increased bargaining prospects with third party vendors, such as consultants, independent experts, and outside counsel. For example, the extensive nature of a rate case lends itself to negotiating service discounts with vendors that may be unwilling to perform at such rates if the discounts were broadcast for their clients and prospective clients to see. Discounts were in fact negotiated with outside counsel in these Dockets, as shown in NS-PGL Ex. 39.9 (Confidential). Moreover, given that the Utilities have an acute interest in keeping such costs low, they maintain better bargaining power in hiring vendors if vendors' rates are not published. The fact that the Utilities may recover some or all of their rate case expenses does not alter the foregoing. The Utilities front, but recover no carrying costs on, these expenses, and it is common for Staff and intervenors to propose rate case expenses adjustments, which sometimes are accepted in whole or in part by a utility and sometimes are adopted in whole or in part on a contested basis by the Commission. Moy Surrebuttal, NS-PGL Ex. 39.0 Corr., 11:229-231.

9. The AG argues that the Confidential designations will limit the ability of the public to understand or assess the services they are paying for. AG Response, ¶ 3. However, the AG fails to cite any legal support for this argument. Section 4-404 of the Act, 220 ILCS 5/4-404, the confidentiality provisions of "Part 285",[3] and the existence of a Protective Order each expressly demonstrate that there will be situations where confidentiality is entitled to protection. The Attorney General's Act itself provides in part: "Upon request, the Office of the Attorney General shall have access to and the use of all files, records, data, and documents in the possession or control of the Commission. The Office of the Attorney General may use information obtained under this Section, including information that is designated as and that qualifies for confidential treatment, **which information the Attorney General's office shall maintain as confidential,** to be used for law enforcement purposes only, which information may be shared with other law enforcement officials." 15 ILCS 205/6.5(d) (emphasis added). Moreover, rate cases commonly involve confidential and/or proprietary information, around which the Commission has sufficiently drafted public final Orders for decades. There is no evidence or authority that this rate case presents exceptional circumstances requiring public disclosure of confidential information.

10. The AG also references Section 10-101 of the Act, 220 ILCS 5/10-101, under which, as the AG characterizes it, "Commission hearings concerning the rates for monopoly services are ordinarily open to the public". AG Response, ¶ 6. Relying on this and other sections of the Act, the AG argues that a general trend favors public disclosure, thus, the Utilities' Confidential information should be made public.[4] What the AG overlooks, however, is that but for the very limited situations where the Protective Order has applied, the vast majority of the

[3] 83 Ill. Admin. Code §§ 285.11, 285.112.

[4] The AG Response also cites 220 ILCS 5/2-107, 5-109, 9-102, 10-109, but none of those Sections is on point. Section 2-107 concerns the opportunity of the public to speak and ask questions at Commission bench sessions. Section 5-109 concerns formal reports made by public utilities to the Commission, and it has a confidentiality clause. Section 9-102 concerns schedules of rates. Section 10-109 concerns Commission investigations of certain kinds of claims, and it has a confidentiality clause.

instant cases, including hearings, pleadings, rulings, etc., has been and is publicly available. Indeed, the evidentiary hearing reflected that the Confidential designations had a very limited impact on the case or hearing as a whole, as only a tiny fraction of the evidence was shielded from the public record. The widespread use of protective orders (which cover limited situations like herein) reflects a systemic recognition that some information must be protected. In turn, like many issues adjudicated in our legal system, the public, absent intervening as a party, must place faith in AG representatives, other intervenors claiming to represent the public interest, Staff, Administrative Law Judges, and the Commission to carry out their respective obligations, which include effective and appropriate use of confidential information.

11. The AG Response's implications as to what information is public also are misleading. For example, the AG Response (at ¶ 7) states in part: "If only the total amount of the expense is available to the public, the benefit of transparency is lost, and the public will lose confidence in the regulatory process." For example, the Schedule C-10.1s, original and updated, which are public,[5] show as to each utility rate case expenses divided among five categories: outside consultants and witnesses, outside legal services, intercompany billings from affiliates, paid overtime, and other expenses, and the Schedules also show the parallel figures from the utility's prior rate case.

12. The AG Response also erroneously argues that the Utilities fail to explain what is privileged about the attorneys' fees invoices detail. AG Response, ¶ 9. The AG's privilege analysis is misleading; the issue here (again) is not about discovery, it is about confidentiality. As the Utilities stated in their Motion: "The foregoing points regarding privilege and work product are not being asserted here as bars to discovery, but rather to demonstrate that there are significant confidentiality interests in such information." Motion, ¶ 23(e). Thus, the Utilities do not invoke a

[5] The original Schedule C-10.1s were filed as public, and the Confidential designations have been withdrawn by the Utilities as to the updated Schedule C-10.1s, as noted earlier.

privilege or work product designation as a general basis for resisting discovery but rather they point to privilege and work product protections to illustrate the confidentiality interests. Also, the AG Response ignores the attorney ethical rule relating to the confidentiality. Motion, ¶ 23(b).

13. The AG also relies on inapplicable case law regarding fee shifting agreements and discoverability, not confidentiality, as noted earlier and discussed further below. To begin with, *LaHood v. Couri*, 236 Ill. App. 3d 641 (3rd Dist. 1992), involved a discovery dispute, not a confidentiality designation. There, the Court ruled against the party seeking fees on the basis that it produced insufficient documentation detailing the nature of the work provided and time spent for which the fees were incurred. *LaHood*, 236 Ill. App. 3d at 649. The same rings true with *Fiorito v. Jones*, 72 Ill. 2d 73 (1978), a case that similarly did not involve confidential designations, but a lack of sufficiently detailed information for the court to render an award. *Fiorito*, 72 Ill. 2d. at 90-95. The *Mars* case was discussed earlier.

14. Conversely, in accordance with the Protective Order, the ALJs, Staff, AG, and other intervenors in this case have been given almost full access to the Utilities' itemized and voluminous billing records from which objections, insights, and arguments could be presented.

15. While the AG Response equates the instant situation with fee shifting, even if that were an apt analogy, the AG has no persuasive answer to the Utilities' citation of N.D. Ill. L. R. 54(d), regarding the confidentiality of fee and nontaxable expense petitions. *Compare* Motion ¶ 23(f) *with* AG Response ¶ 19.

16. Even if there were a legitimate argument derived from the case law cited by the AG, this case does not involve a fee-shifting situation. While the timing of rate cases is intermittent and unpredictable, when they occur the expenses are a normal cost of doing business for a utility. Moy Surrebuttal, NS-PGL Ex. 39.0 Corr., 11:219-227. Thus, the utility is entitled to recover them through rates. Indeed, the AG's own Initial Brief in these Dockets states in part: "In every rate

case, a utility incurs a rate case expense, and it is well settled that it is entitled to recover the cost of the rate case. *Du Page Utility Co. v. Illinois Commerce Comm'n*, 47 Ill.2d 550, 561 (1971)." AG Initial Brief, p. 24.

17. The AG Response (at its Exhibit A) provides the instructions regarding Schedule C-10, but that simply does not speak to the confidentiality issue at hand.

18. The AG Response (at ¶ 17) references two recent Ameren and Illinois American Water rate cases where those utilities filed public Schedule C-10s, but that does not speak to whether the Utilities have shown their Confidential designations are reasonable. The AG Response (at ¶ 18) also cites an ALJ ruling in the recent Commonwealth Edison Co. rate case, which involved discoverability and confidentiality issues. That ruling was addressed by the Motion (at ¶ 25). The ruling denied ComEd's motion, stating "ComEd did not establish that this information is confidential", without further discussion. Although the AG Response asserts the claims are no different here, the Utilities have provided additional grounds in support of their Motion, *e.g.*, N.D. Ill. Local R. 54(d), and, even more importantly, the facts in this case must be evaluated on their own merits and under applicable law. The AG Response (at ¶ 19 and its Exhibit B, mistakenly referenced as Exhibit B) also cites a more recent ALJ ruling in an Ameren rate case. The ruling requires the filing of certain information as an exhibit by September 26, 2011, but on its face it does not address whether it may be designated as confidential. The Commission's e-Docket web site shows that on September 26, 2001, the exhibit in fact was filed in both public and confidential versions, with the entire attachment being confidential. Thus, this citation appears to support the Motion, if anything.

IV. <u>The AG's August 19th Objection Was Untimely</u>

19. The Motion (at ¶¶ 13-20) also showed that the AG's August 19th objection was untimely.

20. The AG claims that a call it made to the Utilities' counsel on June 15, 2011, provided the Utilities with sufficient notice of the AG's objections to the Utilities' Confidential designations, stating, "the language referenced does not require a written objection to be filed with the Commission…. While the Peoples' objection to the designation was not written, the Companies were on notice on June 15, 2011". AG Response, ¶ 26.

21. The Protective Order provides a Challenging Party (a party challenging a confidentiality designation) discretion as to whether it files written notice **with the Commission**. Protective Order, ¶ 14. However, the AG's reliance on that is misplaced, because the issue here is whether the AG provided **the Utilities** with reasonable written notice, not whether they provided the Commission with written notice. The Protective Order clearly requires that a Challenging Party must initiate an objection through written notice to the Producing Party: "If a party does not agree with the Producing Party's designation of documents and information as "Confidential & Proprietary", the party… **shall give the Producing Party reasonable written notice**, by e-mail or U.S. Mail, of the objection." Protective Order, ¶ 14.

22. After speaking with the AG's counsel, the Utilities' counsel, after checking with his clients, called the AG's counsel back, and left a voicemail message. The AG's counsel did not follow up until August 19th. Motion, ¶ 18, fn. 7. Thus, the AG whether by choice or inadvertence waited until after roughly 500 pages of rate case expenses discovery had been produced over the next two months and, one business day before surrebuttal was due and six business days before the evidentiary hearing began, to invoke a process that, under the Protective Order, would take at least two weeks. If the AG had followed up and given reasonable written notice of its objection in mid-June, then the issue could have been adjudicated promptly and the results would have been reflected in the production of that discovery. The AG's delay now calls for an untimely and burdensome retrospective review. The AG's objection also can be denied as untimely.

THEREFORE, for all of the reasons set forth above and in the Utilities' Motion to Preserve the Confidential Designation of Certain Documents (Revised), and all reasons appearing of record, the Utilities respectfully request that the Administrative Law Judges grant said Motion.

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