

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
	:	11-0671
Adoption of 83 Ill. Adm. Code 596.	:	

PROPOSED SECOND NOTICE ORDER

By the Commission:

I. INTRODUCTION

On October 5, 2011, the Illinois Commerce Commission ("Commission") entered a First Notice Order authorizing the submission to the Secretary of State of the first notice of the proposed adoption of 83 Ill. Adm. Code 596, "Public Availability of Inspection Information" ("Part 596"). The proposed rule implements a national gas pipeline safety initiative by U.S. Secretary of Transportation Ray LaHood ("Secretary LaHood") to prevent potentially catastrophic gas-related incidents by making available to the public, by posting on the Commission's website, information obtained in connection with Gas Pipeline Safety Program inspections of jurisdictional entities (gas pipeline operators).

The proposed rule was published in the *Illinois Register* on October 28, 2011, initiating the first notice period pursuant to Section 5-40(b) of the Illinois Administrative Procedure Act, 5 ILCS 100/1-1 et seq. The following parties intervened in this matter: Citizens Utility Board ("CUB"), Lincoln Generating Facility, LLC ("Lincoln"), Ameren Illinois Company d/b/a Ameren Illinois ("Ameren"), Northern Illinois Gas Company d/b/a Nicor Gas Company ("Nicor"), Mt. Carmel Public Utility Co. ("Mt. Carmel"), and North Shore Gas Company and The Peoples Gas Light and Coke Company (collectively, "NS-PGL").

On March 13, 2012, Commission Staff ("Staff"), Ameren, and CUB filed comments on the rule as it appeared in the First Notice Order. Reply comments were filed by NS-PGL and Ameren on March 20, 2012. On March 26, 2012, CUB filed a Motion for Leave to File Reply Comments in response to reply comments filed by NS-PGL.¹ On May 22, 2012, Staff filed a Motion for Leave to File Reply Comments Out of Time². The ALJ granted both Motions. Lincoln, Mt. Carmel, and Nicor did not file any comments. No hearings were held in this proceeding.

¹ CUB's reply comments were filed on March 29, 2012.

² Staff's reply comments were electronically mailed to all parties of record on March 20, 2012. However, the reply comments were not filed on e-docket inadvertently, until March 26, 2012, due to an oversight.

II. PROPOSED REVISIONS TO PART 596

A. Section 596.40³ Provisional Confidential or Proprietary Information

1. Ameren

Ameren asserts that it recognizes the merits of making inspection information available to the public, however, it proposes several modifications to Staff's proposed rule primarily because of its concern that the rule does not provide sufficient safeguards to protect confidential and proprietary information. Ameren's first proposed modification relates to its concern that the proposed rule, as written, would create the problem of posting confidential or proprietary information to the Commission's website before an affected person could file a request that the information be treated as confidential or proprietary. (Ameren Initial Comments at 1). Ameren argues that it is more appropriate to protect confidential or proprietary information before it is released to the public. Additionally, Ameren maintains that the ability to mark documents as "provisionally confidential" or "provisionally proprietary" will ensure timely responses during the course of a Commission inspection or investigation action without adding complications which may be associated with petition filing. (Ameren Reply Comments at 2). Therefore, Ameren proposes the addition of Section 596.40, as detailed below:

Section 596.40 Provisional Confidential or Proprietary Information

Any person may mark inspection information as "Provisionally Confidential" or "Provisionally Proprietary," in which case the Commission shall afford confidential or proprietary treatment thereof for at least thirty (30) days thereafter. If the person does not request that the Commission enter an order to protect the confidential or proprietary information during the 30-day provisional period, the inspection information shall no longer be considered confidential or proprietary.

(Exhibit A to Ameren Initial Comments at 2).

2. Staff

It is Staff's opinion that Ameren's request for a period of 30 days during which inspection information is presumed to be confidential is not unreasonable. However, Staff argues that Section 596.30 of the proposed rule clearly allows for a party to request proprietary treatment and such information would obviously be treated as proprietary during the pendency of the request. (Staff Reply Comments at 2). Accordingly, Staff therefore does not see a compelling reason to depart from its proposed rule.

³ Section numbers have been changed to match the corrections made to the numbering in the proposed rule as published in the *Illinois Register*.

3. NS-PGL

NS-PGL supports Ameren's proposed additions as detailed in Sections II. A. through II. E. herein, especially the proposed additions detailed in Sections II. A. and II. B. NS-PGL argues that Ameren's additions are useful to define how to implement the protections in Sections 4-404 and 5-108 of the Act and Section 200.430 of the Rules of Practice. (NS-PGL Reply Comments at 3). NS-PGL avers that the Commission's Rules of Practice include a clear process to implement the requirements of Sections 4-404 and 5-108 of the Act which afford protection of confidential and proprietary information. However, NS-PGL argues that Section 200.430 of the Commission's Rules of Practice may not squarely address the proposed rule because the Rules of Practice apply only to a docketed proceeding, which is often not the case for information requests. (*Id.*). According to NS-PGL, if, as would be appropriate, it is the Commission's intent that the proposed rule apply only to docketed proceedings, then language clarifications to that effect are needed. NS-PGL maintains that Ameren's proposed additions to the rule properly address this issue by providing a reasonable structure to help ensure that a person submitting inspection information to the Commission has adequate time to request confidential treatment. NS-PGL argues these procedures are essential to implementing Sections 4-404 and 5-108 of the Act.

NS-PGL notes that unlike the Federal Energy Regulatory Commission which treats the information it receives as nonpublic with specified exceptions, the proposed rule appears to presume the information the Commission receives would be public, which accentuates the importance of Ameren's well-defined procedures to protect confidential or proprietary information. (*Id.* at 2). Additionally, NS-PGL urges the Commission to assess any submitted information for which a party claims is confidential and proprietary on its own merit, rather than presuming, as NG-PGL argues Staff does in its comments, that certain information is not protected by FOIA as confidential and proprietary information.

4. Commission Analysis and Conclusion

The Commission finds that there is no compelling reason to depart from Staff's proposed rule, which the Commission believes is reasonable. The proposed rule as currently written provides the opportunity for requests for proprietary treatment. The rule also addresses the concerns expressed by Ameren and NS-PGL because the information subject to a request for proprietary treatment will be treated as proprietary during the pendency of a request for proprietary treatment. The proposed rule as revised herein will ensure that a jurisdictional entity that submits inspection information to the Commission will have adequate time to request confidential treatment of information it deems proprietary. Accordingly, the Commission declines to adopt Ameren's proposed addition.

B. Section 596.50 Pre-Existing Inspection Information

1. Ameren

Ameren maintains that in its current form, the proposed rule allows for the posting of years of inspection information previously received to the Commission's website, or to be otherwise made available to the public, without any notification to the affected persons. (Ameren Initial Comments at 1). Ameren argues Staff's proposed rule should be applied prospectively, meaning that reports of inspections conducted prior to the effective date of the rule should not be posted on the Commission's website. (*Id.*). Accordingly, Ameren proposes the addition of Section 596.50, as detailed below:

Section 596.50 Pre-Existing Inspection Information

Inspection information gathered by an agent or employee of the Commission prior to the effective date of this Part shall remain confidential. To the extent that the Commission seeks to make inspection information gathered previous to the effective date of this Part available to the public or post such inspection information to the Commission's website, it shall provide copies of all inspection information to be posted or otherwise made available to the public to the affected person to review for a period of at least sixty (60) days. The person shall be permitted to request that the Commission enter an order to protect the confidential or proprietary information prior to the information being posted to the Commission's website or any other public dissemination.

(Exhibit A to Ameren Initial Comments at 2).

2. Staff

Staff recommends that the Commission reject Ameren's proposal that the proposed rule should be applied prospectively. (Staff Reply Comments at 2). Staff argues that the clear intent of Secretary LaHood's initiative is to inform the general public regarding the state of pipelines generally, not simply prospectively. Staff maintains that it is clear that the intent of the initiative is to inform the public regarding the state of pipelines in the areas they live and work. If inspection information were made available only prospectively, this would be frustrated in Staff's view, since historical inspection information is clearly relevant. (*Id.*).

3. NS-PGL

As previously discussed in Section II. A. 3 above, NS-PGL supports Ameren's proposed addition.

4. Commission Analysis and Conclusion

Ameren and NS-PGL have both expressed concern about the potential disclosure of confidential and proprietary information in connection with the Gas Pipeline Safety Program inspections. The Commission shares this concern and takes it very seriously. However, the Commission believes the proposed rule should not be applied prospectively as this would hamper the intent of Secretary LaHood's initiative to inform the public regarding the state of pipelines generally. Accordingly, the Commission adopts a revised version of Ameren's proposed addition as detailed below and renumbered as Section 596.40, to achieve both objectives:

Section 596.40 Pre-Existing Inspection Information

To the extent that the Commission seeks to make inspection information gathered previous to the effective date of this Part available to the public or post such inspection information to the Commission's website, it shall make available copies of all inspection information to be posted or otherwise made available to the public to the affected person to review for a period of at least sixty (60) days. The person shall be permitted to request that the Commission enter an order to protect the confidential or proprietary information prior to the information being posted to the Commission's website or any other public dissemination pursuant to Section 596.30.

C. Section 596.60 Inspection Information Posted on Commission Website

1. Ameren

Ameren contends that jurisdictional entities should have an opportunity to review inspection information before it is posted in order to assure that their confidential and proprietary interests are protected. Ameren argues that the public interest, in certain circumstances, may warrant that particular inspection information, such as competitive bids, employee disciplinary information, and attorney-client privileged and work product, be held in confidence. (Ameren Initial Comments at 2). Accordingly, Ameren proposes the addition of Section 596.60, as detailed below:

Section 596.60 Inspection Information Posted on Commission Website

In all cases other than those addressed in Sections 596.40 and 596.50, any affected person shall be given fourteen (14) days to review all inspection information attributed to the person or otherwise gathered from the person prior to it being posted to the Commission's website for review, or otherwise be made available to the public.

(Exhibit A to Ameren Initial Comments at 2).

2. NS-PGL

As previously discussed in Section II. A. 3 above, NS-PGL supports Ameren's proposed addition.

3. Commission Analysis and Conclusion

The Commission finds the language proffered by Ameren is reasonable and it is adopted. As stated in Section II. B. 4 above, the Commission is concerned about the potential disclosure of confidential and proprietary information in connection with the Gas Pipeline Safety Program inspections. The Commission believes a 14-day period for review of inspection information before it is made public will add appropriate protection to ensure that confidential and proprietary information is not posted before affected parties have an opportunity to review such information and request proprietary treatment, if necessary. However, the proposed language is adopted with a modification deleting the reference to Ameren's proposed section concerning provisional or proprietary information, which is not adopted, and section references have been renumbered as follows:

Section 596.50 Inspection Information Posted on Commission Website

In all cases other than those addressed in Section 596.40, any affected person shall be given fourteen (14) days to review all inspection information attributed to the person or otherwise gathered from the person prior to it being posted to the Commission's website for review, or otherwise be made available to the public.

D. Section 596.70 Removal of Inspection Information from Commission Website

1. Ameren

Ameren asserts that the Commission, as the publisher of the inspection information, assumes a legal obligation that the inspection information is true, correct, and neither confidential nor proprietary. (Ameren Reply Comments at 2). It is Ameren's position, however, that Staff's proposed rule does not provide sufficient protection in the event inaccurate, incorrect, confidential, or proprietary information is posted to the Commission's website. (Ameren Initial Comments at 2). To address this concern, Ameren proposes the addition of Section 596.70, as detailed below:

Section 596.70 Removal of Inspection Information from Commission Website

A person may file a petition to remove inspection information previously posted to the Commission's website to the extent that the inspection information is not accurate, incorrect, confidential, or proprietary.

(Exhibit A to Ameren Initial Comments at 2).

2. Staff

Staff urges the Commission to flatly reject Ameren’s proposal to allow for removal of “inaccurate [or] incorrect” information. Staff argues its inspection reports are just that: reports of Staff inspections of pipeline operators’ facilities, procedures, and compliance history. (Staff Reply Comments at 3). Staff maintains that permitting a utility to attempt to suppress inspection reports by arguing that the reports contain information that the utility considers “inaccurate [or] incorrect” – presumably because it simply does not agree with the substance of the report – would chill the process. (*Id.*).

3. NS-PGL

As previously discussed in Section II. A. 3 above, NS-PGL supports Ameren’s proposed addition.

4. Commission Analysis and Conclusion

The Commission declines to adopt the proposed language offered by Ameren. The Commission believes Ameren’s proposed language concerning the removal of inspection information on the basis that it is deemed inaccurate or incorrect will have a chilling affect on the inspection and reporting process. Moreover, the information that will be posted will consist of Staff’s reports of its inspections of pipeline operators’ facilities, procedures, and compliance history. As such, the reports are essentially summaries of Staff’s observations during the course of its inspections and do not constitute Commission conclusions any more than other Staff reports, testimony or briefs constitute Commission conclusions or findings. The Commission also notes that there are already procedures in place to permit jurisdictional entities to request the removal of confidential or proprietary information. Additionally, Section 596.30 provides for such a request in the event confidential and proprietary information is inadvertently made public. Accordingly, the Commission declines to adopt the language proffered by Ameren.

E. Section 596.80 Disclaimer for Inspection Information on Commission Website

1. Ameren

Ameren asserts that given the public nature of the posting of inspection information to the Commission’s public website, a disclaimer should be included on the Commission’s website. (Ameren Initial Comments at 2). Accordingly, Ameren proposes the addition of Section 596.80, as detailed below:

Section 596.80 Disclaimer for Inspection Information on Commission Website

Any page on the Commission’s website containing inspection information shall contain the following disclaimer: “This information cannot be relied upon for business purposes, and no warranties as to the accuracy of the information are being made by any party, and it should be understood that any investigation by an agent or employee of the Commission may still be ongoing.”

(Exhibit A to Ameren Initial Comments at 3).

2. Staff

Staff offers no opinion regarding Ameren’s proposal that a disclaimer be added to the Commission’s website concerning the posted information. However, Staff argues that if a disclaimer is included, it should be one drafted by the Commission, rather than Ameren. (Staff Reply Comments at 3).

3. NS-PGL

As previously discussed in Section II. A. 3 above, NS-PGL supports Ameren’s proposed addition.

4. Commission Analysis and Conclusion

The Commission declines to adopt Ameren’s proposal that the proposed rule specify that a disclaimer be added to the Commission’s website concerning the posted information. Such a disclaimer is unnecessary. As with the other reports and summaries prepared and posted on the Commission’s website by Staff, the inspection reports simply memorialize and/or summarize Staff’s findings, in this case, Staff’s inspections of pipeline operators’ facilities, procedures, and compliance history. Thus, this information will be given the appropriate weight by reviewing parties. Accordingly, Ameren’s proposed addition is not approved.

F. Section 596.10 Definitions

1. CUB

CUB proposes two revisions to Staff’s proposed definition of “inspection information” in Section 596.10. CUB’s first proposal is to add inspection plans and reports required of jurisdictional entities under the Illinois Gas Pipeline Safety Act (“IGPSA”) to Staff’s definition. (CUB Initial Comments at 4). According to CUB, these changes will further Secretary LaHood’s goal of improving data reporting to the public.

CUB’s second proposal is to add information regarding gas pipeline leaks, lost gas, and unaccounted for gas to Staff’s proposed definition. CUB argues that given Secretary LaHood’s emphasis on identifying “areas of high risk,” “improving the safety and efficiency” of gas pipelines, and allowing gas customers to be sure that their usage

does not endanger “their families and neighbors,” it is necessary to identify leaks and sources of unaccounted for or lost gas. (*Id.*). CUB’s proposed changes to add information related to inspections that are identified in IGPSA and to identify leaks and lost and unaccounted for gas are detailed below:

Section 596.10 Definitions

* * *

“Inspection information” shall include all information that has come to the Commission in the course of any inspection or other activity performed by any agent or employee of the Commission, or provided to the Commission by any person regarding pipeline leaks, lost gas, or unaccounted for gas under the jurisdiction of the Illinois Gas Pipeline Safety Act [220 ILCS 20] (Act), including, without limitation, any account, record, memorandum, book, paper, document, plan, report, plant, facility, equipment or other property of any person subject to Commission jurisdiction under the Act, and irrespective of the medium in which the information exists.

(Attachment A to CUB Initial Comments at 1).

CUB takes issue with NS-PGL’s position concerning CUB’s proposed addition of information regarding gas pipeline leaks, lost gas, and unaccounted for gas to Staff’s proposed definition of “inspection information”. It is CUB’s position that the information submitted on a Form 21 annual report is not publicly available in the way envisioned by Staff’s proposed rule or by Secretary LaHood’s gas pipeline safety initiative. CUB points out that Illinois law makes the contents of these Form 21 reports “open to public inspection.” However, CUB asserts that in attempting to obtain copies of these Form 21 reports from the Commission, it was informed that: (1) it would have to obtain a copy physically from the Commission’s offices in either Springfield or Chicago and (2) it would have to pay a 25 cent-per-page copying fee for any pages requested. CUB argues that for a document that is potentially hundreds of pages long, this method of public inspection is contrary to the language of Staff’s proposed rule and is inconsistent with Secretary LaHood’s initiative. (CUB Reply Comments at 4). Additionally, CUB argues that requiring physical pick-up in only two offices across the entire state and requiring approximately \$180 in payment for a full report cannot reasonably be considered making the Form 21 reports “available to the public.” CUB further argues that although the Commission’s website does contain copies of the blank forms used to populate a Form 21 annual report, it was unable to locate any report submitted by any utility using Form 21 on the Commission’s website. (*Id.*).

CUB also challenges NS-PGL’s assertion that “given the effect of lost and unaccounted for gas on gas costs that utilities recover from customers, that information is potentially the subject of annual review proceedings.” CUB argues “potential” availability is inconsistent with both Staff’s proposed rule and Secretary LaHood’s

initiative. (*Id.* at 5). CUB contends that even if the information at issue were to become available in such an annual proceeding, the disclosure of that information to the public would be subject to the Commission's Rules of Practice, any applicable Rules of Evidence, and any rulings of the Commission or ALJs in that particular proceeding. Moreover, CUB maintains that it is unclear on whom the burden of making the information available to the public would fall. CUB argues the desirability of public access to such information is uncontested by NS-PGL. (*Id.*).

2. NS-PGL

NS-PGL contends that CUB's proposed addition to the definition of "inspection information" is unnecessary. According to NS-PGL, the requested information is already publicly available (*e.g.*, gas utilities' annual reports to the Commission (Form 21) include lost and unaccounted for gas). (NS-PGL Reply Comments at 5). Moreover, given the effect of lost and unaccounted for gas on gas costs that utilities recover from customers, that information is potentially the subject of annual review proceedings under Section 9-220(a) of the Act. (*Id.*).

3. Commission Analysis and Conclusion

The Commission finds CUB's first proposal to add inspection plans and reports to Staff's definition is reasonable and it is adopted. However, the Commission declines to adopt CUB's second proposal to add information provided by any person regarding gas pipeline leaks, lost gas, and unaccounted for gas to Staff's proposed definition. While the Commission believes Staff's proposed definition should be inclusive, the language proffered by CUB is unnecessary and beyond the scope of the proposed rule. The Commission notes that information concerning pipeline leaks, lost gas, or unaccounted for gas should be included in Staff's reports to the extent that Staff obtains such information in connection with Gas Pipeline Safety Program inspections of jurisdictional entities. Any additional information beyond information obtained during the course of Staff's inspections or other activities performed is beyond the scope of the proposed rule. Additionally, the Commission is concerned that CUB's proposed language could lead to the dissemination of inaccurate information since the information it proposes to include can be reported to the Commission by any person. Accordingly, the Commission declines to adopt CUB's second proposal and Staff's proposed definition, as modified by CUB's first proposal is adopted as follows:

Section 596.10 Definitions

* * *

"Inspection information" shall include all information that has come to the Commission in the course of any inspection or other activity performed by any agent or employee of the Commission under the jurisdiction of the Illinois Gas Pipeline Safety Act [220 ILCS 20] (Act), including, without limitation, any account, record, memorandum, book,

paper, document, plan, report, plant, facility, equipment or other property of any person subject to Commission jurisdiction under the Act, and irrespective of the medium in which the information exists.

G. Section 596.30 Confidential or Proprietary Information

1. CUB

CUB proposes adding language to the reference in Staff's proposed Section 596.30 to the Commission's Protective Order rule. CUB explains that Staff's proposed rule allows jurisdictional persons to "request that the Commission enter an order to protect the confidential or proprietary information pursuant to 83 Ill. Adm. Code 200.430." CUB further explains that the Commission's Protective Orders rule allows the Commission to enter such an order "during the pendency of a proceeding." (CUB Initial Comments at 5). CUB argues its proposed language clarifies what the "proceeding" at question is, and the rights of intervening parties to support or oppose the jurisdictional person's motion for entry of a protective order. CUB's proposed language is as follows:

Section 596.30 Confidential or Proprietary Information

Any person, as set forth in Section 596.20, who believes that any inspection information is confidential or proprietary, shall request that the Commission enter an order to protect the confidential or proprietary information pursuant to 83 Ill. Adm. Code 200.430. For purposes of this rule, a "proceeding" shall mean the docketed proceeding established by the Commission to consider the request of any person that the Commission enter an order to protect confidential or proprietary information. Any intervenor in the proceeding shall be given an opportunity to respond to any person requesting an order to protect confidential or proprietary information.

(Attachment A to CUB Initial Comments at 1).

CUB asserts that it has no objection to NS-PGL's proposed modification to the proposed language detailed above to allow a party seeking confidential treatment of information submitted to the Commission to reply to any intervenor's response. (*Id.* at 6).

2. NS-PGL

NS-PGL agrees that it is reasonable to add procedural language to the proposed rule, however, NS-PGL supports Ameren's language over CUB's. NS-PGL states that if the Commission adopts CUB's language, the language should be modified to clarify that the party seeking protection of its information, as the moving or petitioning party, would have a right to reply to any intervenor's response to its request consistent with Section 200.190(e) of the Rules of Practice. (*Id.*).

3. Commission Analysis and Conclusion

The Commission finds that the language proffered by CUB is reasonable and it is adopted. Additionally, the Commission finds that it would be beneficial to add the modification suggested by NS-PGL and it is adopted also. These additions to Staff's proposed Section 596.30 add clarity to the rule. Accordingly, the Commission adopts the following language proposed by CUB, as modified by NS-PGL:

Section 596.30 Confidential or Proprietary Information

Any person, as set forth in Section 596.20, who believes that any inspection information is confidential or proprietary, shall request that the Commission enter an order to protect the confidential or proprietary information pursuant to 83 Ill. Adm. Code 200.430. For purposes of this rule, a "proceeding" shall mean the docketed proceeding established by the Commission to consider the request of any person that the Commission enter an order to protect confidential or proprietary information. Any party granted the right to intervene in the proceeding shall be given an opportunity to respond to any person requesting an order to protect confidential or proprietary information. The petitioning party shall be given an opportunity to reply to such response. All responses and replies shall be filed and served as provided in 83 Ill. Adm. Code 200.190(e).

III. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

- (1) the Commission has jurisdiction over the parties hereto and the subject matter herein;
- (2) the recitals of fact and law set forth in the prefatory portion of this Second Notice Order are supported by the record and are hereby adopted as findings of fact and conclusions of law; and
- (3) the proposed rule, 83 Ill. Adm. Code 596, as reflected in the attached Appendix, should be submitted to JCAR to begin the second notice period.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the proposed rule, 83 Ill. Adm. Code 596, as reflected in the attached Appendix, be submitted to the Joint Committee on Administrative Rules, pursuant to Section 5-40(c) of the Illinois Administrative Procedure Act.

IT IS FURTHER ORDERED that this Second Notice Order is not final and is not subject to the Administrative Review Law.

DATED:	June 4, 2012
BRIEFS ON EXCEPTIONS DUE:	June 18, 2012
REPLY BRIEFS ON EXCEPTIONS DUE:	June 25, 2012

Sonya J. Teague
Administrative Law Judge