

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

NORTH SHORE GAS COMPANY	:	
	:	No. 12-0511
Proposed general increase in rates for gas service.	:	
	:	(Cons.)
THE PEOPLES GAS LIGHT AND COKE COMPANY	:	
	:	No. 12-0512
Proposed general increase in rates for gas service.	:	

**NORTH SHORE GAS COMPANY’S AND
THE PEOPLES GAS LIGHT AND COKE COMPANY’S
REPLY IN SUPPORT OF THEIR MOTION
FOR ENTRY OF A PROTECTIVE ORDER**

North Shore Gas Company (“North Shore”) and The Peoples Gas Light and Coke Company (“Peoples Gas”) (together, the “Utilities”), by their counsel, submit this Reply in Support of Their Motion for Entry of a Protective Order. The motion should be granted.

INTRODUCTION AND SUMMARY

The Utilities’ proposed Protective Order permits parties and Staff to answer discovery promptly while lawfully protecting defined classes of “Confidential” and “Confidential & Proprietary” information. The proposed Protective Order is proper under Sections 4-404 and 5-108 of the Public Utilities Act (the “Act”), 220 ILCS 5/4-404, 5-108, and under Section 200.430 of the Commission’s Rules of Practice, 83 Ill. Admin. Code § 200.430.

The proposed Protective Order uses the same definitions of “Confidential” and “Confidential & Proprietary” that have been used successfully in at least twelve other recent Dockets, including the 2007 2009, and 2011 North Shore and Peoples Gas rate cases, ICC Docket Nos. 07-0241/0242 (Cons.), 09-0166/0167 (Cons.), and 11-0280/0281 (Cons.); the 2005,

2007, 2010, 2011, and 2012 Commonwealth Edison Company (“ComEd”) rate cases, ICC Docket Nos. 05-0597, 07-0566, 10-0467, 11-0721, and 12-0321; ComEd “CPCN” Dockets, ICC Docket No. 10-0385 and 11-0692; ComEd’s Storm proceeding, ICC Docket No. 11-0588; and ComEd’s “Alternative Regulation” proceeding, ICC Docket No. 10-0527.¹

The Citizens Utility Board (“CUB”) filed the only response to the Utilities’ motion. CUB does not generally object to entry of a protective order, but CUB proposes to significantly alter the definition of “Confidential” and, apparently, to eliminate the category of “Confidential & Proprietary”. *See* CUB response at pp. 2, 7-10. When raised, CUB’s position was rejected in all the above-referenced Dockets, and it should be rejected again.

In particular, CUB’s claim (CUB response at pp. 3-4) that the Utilities can over-designate under the definitions in the proposed Protective Order is baseless. In the instant Dockets, as of October 8, 2012, the Utilities had responded to 559 data requests. The Utilities have made only 54 confidentiality designations. No dispute over a confidentiality designation has been raised with the Administrative Law Judges (“ALJs”). No such dispute was raised with the ALJs in the Utilities’ 2007 and 2009 rate cases, the 2005, 2007, and 2012 ComEd rate cases, or the ComEd CPCN, Storm, and Alternative Regulation Dockets, either. A single dispute was raised with the ALJs in each of the 2010 ComEd rate case and the 2011 North Shore/Peoples Gas rate cases, which in substance was a discovery dispute and ultimately did not turn on the definitions at issue here.

Moreover, CUB’s legal arguments are erroneous. CUB’s brief never even mentions Section 5-108 of the Act, one of the controlling statutory provisions, despite the fact that that

¹ There have been some minor language changes from some of the earlier cases, consisting of changes in the sequence of terms and, in relation to critical energy infrastructure information, the addition of a reference to federal law, 18 C.F.R. § 388.13.

same omission was pointed out in past Dockets when CUB filed similar responses. Further, CUB only gives a passing reference to Section 4-404 of the Act, the other controlling statutory provision, in the introduction to its brief. CUB's arguments incorrectly attempt to distinguish an evidentiary record from a judicial record and presuppose that materials exchanged in discovery before the ICC are "judicial records", and, in effect, that the Utilities are a government agency.

DISCUSSION

CUB's primary proposal is to substitute the definition of "Confidential" that was adopted by the Protective Order in the 2007 Ameren Illinois Utility ("AIU") rate cases, ICC Docket Nos. 07-0585 *et al.* Cons., and, apparently, to eliminate the category of "Confidential & Proprietary".² See CUB response at pp. 6-7. CUB, alternatively, advocates the definition of "Confidential" from the Protective Order in the 2009 and 2011 Illinois American Water Co. ("IAWC") rate cases, ICC Docket No. 09-0319 and 11-0767, or that in the Northern Illinois Gas Company ("Nicor") reorganization proceeding, ICC Docket No. 11-0046. CUB response at pp. 8-9. CUB's position lacks merit both factually and legally. CUB's position was rejected in dockets where it filed responses, including the Utilities' 2007, 2009 and 2011 rate cases, the 2005, 2007, 2010, and 2011 ComEd rate cases, and the ComEd "CPCN" and Alternative Regulation Dockets. CUB's position should be rejected again.

I. The Facts Do Not Support CUB's Arguments

Extensive experience has shown that the definitions in the Utilities' proposed Protective Order lead to appropriate designations. CUB purports to be concerned that the Utilities could designate everything they produce as confidential under the proposed definitions of "Confidential" and "Confidential & Proprietary" (CUB response at pp. 3-4), but that purported

² AIU proposed similar language in their 2009 and 2011 rate cases. See ICC Docket Nos. 09-0306, *et al.* (Cons.) and 11-0279 and 11-0282 (Cons.).

concern lacks any foundation. As of October 8, 2012, the Utilities have answered 559 data requests in the instant Dockets. The Utilities have made only appropriate confidentiality designations. In only 54 of those data request responses have the Utilities designated a response or attachment as Confidential or Confidential & Proprietary. No objection to a confidentiality designation has been brought to the ALJs. In fact, to date in this consolidated proceeding, no party has raised a concern with the Utilities regarding a confidentiality designation.

The proposed Protective Order uses the same definitions of “Confidential” and “Confidential & Proprietary” that were used in the Protective Orders in the Utilities’ 2007, 2009, and 2011 rate cases (*see* footnote 1, *supra*). No objection to a confidentiality designation was brought to the ALJs in the Utilities’ 2007 and 2009 rate cases, either. In the 2011 rate cases, one objection was brought to the ALJs’ attention but it did not turn on the definitions at issue here.

The same definitions also were used in the 2005, 2007, 2010, 2011, and 2012 ComEd rate cases and in ComEd’s CPCN, Storm, and Alternative Regulation Dockets (*see* footnote 1, *supra*). In each of those Dockets, not one objection to any confidentiality designation was brought before the ALJs, except for a single dispute raised with the ALJs in the 2010 ComEd rate case that in substance was a discovery dispute and ultimately did not turn on the definitions. In the 2007 AIU rate cases, where CUB’s preferred definition was used, two objections to confidentiality objections were brought before the ALJs.

CUB attempts to draw a distinction between the “evidentiary record” and the “judicial record” and that the public is entitled to access to the judicial record. Further, CUB attempts to categorize discovery documents as part of the judicial record. CUB response at p. 3-4. CUB’s arguments are legally and factually incorrect and should be rejected. Moreover, CUB does not and cannot claim that there in fact has been any undue (or even any) administrative burden in the

many past Dockets that used the definitions in the proposed Protective Order. Moreover, those definitions comport with the law, in any event, as discussed in the next section of this Reply.

II. CUB's Legal Arguments Are Erroneous

Section 4-404 is the central provision of the Act governing confidential materials. Section 4-404 of the Act directs in part that: “The Commission shall provide adequate protection for confidential and proprietary information furnished, delivered, or filed by any person, corporation, or other entity.” 220 ILCS 5/4-404. CUB’s response glosses over Section 4-404 and does not even mention Section 5-108 of the Act, which prohibits unauthorized release of such materials. CUB’s legal arguments instead rest on two false premises: that materials exchanged in discovery before the ICC are “judicial records” and in effect that the Utilities are a government agency.

The “Judicial Records” Argument. CUB argues that the definitions in the proposed Protective Order are inconsistent with the principle of public access to “judicial records” (CUB response at pp. 3-4), but, of course, none of CUB’s cites provides any support for the leap of illogic that equates discovery materials with judicial records. In fact, CUB’s entire response cites no authority that supports public access to discovery documents. As was made clear by the court in *Shenandoah Publishing House, Inc. v. Fanning*, 368 S.E. 2d 253 (Va. 1988), which CUB cites here (CUB response, pp. 4 and 10), there is an obvious distinction between “judicial records” including pleadings, exhibits, and court orders, versus “pretrial documents” containing information provided by the parties in the discovery process. As to the latter, the court concluded that there is no authority granting any right to public access of discovery documents, noting the United States Supreme Court’s opinion that “pretrial depositions and interrogatories are not public components of a civil trial.” *Id.* at 257, citing *Seattle Times Co. v. Rhinehart*, 467

U.S. 20, 33 (1984). Finally, CUB’s implication that the evidentiary record is somehow different from the judicial record is unsupported by any case law and lacks merit. The Commission rules clearly define what the “record” in a Commission proceeding includes. *See* 83 Ill. Admin. Code §200.700. The Commission rule is derived from the Illinois Administrative Procedure Act. *See* 5 ILCS 100/10-35.

The “Threshold Requirements” Argument. CUB mixes its discussion of access to judicial records with discussion of “the threshold requirements for the designation of confidential information”. CUB response at pp. 4-6. CUB cites nine authorities: four ICC rules, two Sections of the Act, and three cases. None supports CUB.

CUB cites 83 Ill. Adm. Code § 200.25(a), which it also cites as to the objective of protecting the integrity of the fact-finding process. CUB response at pp. 4-5.³ Section 200.25(a) expressly addresses “the hearing process”, however, not discovery. CUB’s attempt to suggest that providing for the production of information and materials in discovery with appropriate confidentiality protections somehow might imperil correct fact-finding (*see* CUB response at p. 4) is unexplained and unsupported rhetoric and has no basis in experience. CUB also cites 83 Ill. Adm. Code § 200.530, but Section 200.530 also expressly is about the evidentiary hearing, not discovery. CUB further cites 83 Ill. Adm. Code § 200.340, which relates to full disclosure in discovery, but the dispute at hand is not about what will or will not be produced in discovery; rather, it is about protecting confidential material that is produced in discovery.⁴

CUB argues that “Nor is there a dispute that a protective order provides the relevant and appropriate procedural mechanism to protect certain information – in extraordinary

³ In one instance, CUB refers to 83 Ill. Adm. Code § 200.250. There is no such section. That appears to have been a typographical error, with the intended cite being 83 Ill. Adm. Code § 200.25.

⁴ Because the dispute at hand is not about what will or will not be produced in discovery, CUB’s invocation of “transparency” (CUB response at p. 2) also is empty rhetoric.

circumstances- that warrants confidential treatment.” It cites Section 200.430 to support its claim. CUB response at p. 2. However, Section 200.430(a) contains no language about a protective order only protecting information “in extraordinary circumstances.” In fact, Section 200.430(a) simply states: “At any time during the pendency of a proceeding, the Commission or the Hearing Examiner may, on the motion of any person, enter an order to protect the confidential, proprietary or trade secret nature of any data, information or studies.” CUB’s argument is misleading and should be rejected.

Furthermore, CUB’s case on its “threshold requirements” argument is a citation to an irrelevant case regarding judicial records and other public records.

CUB’s statutory citations likewise are off the mark. CUB cites Section 10-101 of the Act, 220 ILCS 5/10-101, but the part of Section 10-101 to which CUB alludes also expressly addresses the evidentiary hearing, not discovery. CUB also cites Section 5-109 of the Act, 220 ILCS 5/5-109, but Section 5-109 expressly addresses “reports made to the Commission by any public utility”, not discovery materials. In any event, Section 5-109 certainly could not be read to trump the more specific provisions of Sections 4-404 and 5-108 of the Act that expressly protect confidential and proprietary materials. *See, e.g., Knolls Condominium Ass'n v. Harms*, 202 Ill. 2d 450, 459 (2002) (“It is also a fundamental rule of statutory construction that where there exists a general statutory provision and a specific statutory provision, either in the same or in another act, both relating to the same subject, the specific provision controls and should be applied.”)

The FOIA and “Trade Secrets” Arguments. CUB then moves on to citation of the Illinois and federal Freedom of Information Acts (“FOIA”) and the Illinois Trade Secrets Act. CUB response at pp. 6-7. CUB thus erroneously treats the Utilities as if they were a government

agency, or treats discovery materials from a proceeding before a government agency as if they were documents of the agency itself, which no authority cited by CUB supports.

CUB cites two court opinions and a Commission Order involving the FOIA. None is relevant. The documents in question in the two court cases, *Bowie v. Evanston Community Consol. Sch. Dist.*, 128 Ill. 2d 373, 378 (1989), and *Cooper v. Department of the Lottery*, 266 Ill. App. 3d 1007 (1st Dist. 1994), belonged to a governmental body, which is not the case here. Additionally, the agency in *Bowie* admitted that the document in dispute was a public record, *Bowie*, 128 Ill. 2d at 381, which, again, cannot be compared to the current situation. The Commission Order that CUB cites, *Cass Long Distance Services*, ICC Docket No. 98-0060 (Reopen), 1999 Ill. PUC LEXIS 206 (Order March 10, 1999), is equally inapplicable to the case at hand. The Commission previously and correctly ruled in ComEd's 2001 rate case that the decision in *Cass* does not apply to discovery of non-public documents of a utility in a rate case. *In re Commonwealth Edison Co.*, ICC Docket No. 01-0423, Sept. 13, 2001, Tr. 166-68 (Order December 31, 2001). The Commission agreed with the assessment of the ALJs in that Docket that *Cass* addresses a "differen[t] situation", where a party sought confidential treatment for annual reports "which were already public documents." The ALJs and the Commission correctly concluded that the FOIA standards that applied to the public document in *Cass* simply do not apply to the confidentiality of a utility's non-public documents. *Id. See also Illinois Bell Tel. Co.*, ICC Docket No. 04-0310, pp. 9-10 (Order Feb. 24, 2005) (rejecting similar arguments based on the FOIA and *Cass*).

Thus, CUB's invocation (CUB response at pp. 6-7) of the trade secret provision of the FOIA, 5 ILCS 140/7(1)(g), and of a section of the Illinois Trade Secrets Act, 765 ILCS 1065/2(d), is irrelevant. FOIA standards do not apply here.

Moreover, there is nothing in Section 4-404 of the Act or any other legal authority that limits the confidentiality protection that a party may seek in discovery before the Commission to trade secrets. In fact, the Commission's rule on protective orders, quoted earlier, recognizes three categories of material: "confidential, proprietary or trade secret ... data, information or studies". 83 Ill. Adm. Code § 200.430(a); *see also id.* at § 200.430(c). Thus, to limit confidentiality protection to trade secrets would be flatly contrary to the Commission's rules, too.

Finally, CUB contends that the definitions of "Confidential" in the Protective Orders in the 2007, 2009, 2011 and 2012 AIU rate cases, the 2009 and 2011 IAWC rate case, and the 2011 Nicor reorganization case are consistent with CUB's reading of the law, relying on repeat citations of two of CUB's judicial records cases. *See* CUB response at pp. 7-10. However, as discussed above, CUB's claimed fear of over-designation is contrary to actual experience in the instant Docket, the 2007, 2009, and 2011 North Shore and Peoples Gas rate cases, the 2005, 2007, 2010, 2011, and 2012 ComEd rate cases, and the ComEd CPCN, Storm, and Alternative Regulation Dockets, and CUB's legal arguments are contrary to law.

THEREFORE, the Utilities' proposed Protective Order should be adopted, without modification.

Dated: October 9, 2012

Respectfully submitted,



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