

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

WISCONSIN ENERGY CORPORATION,	)	
INTEGRYS ENERGY GROUP, INC.	)	
PEOPLES ENERGY, LLC, THE PEOPLES	)	
GAS LIGHT AND COKE COMPANY,	)	
NORTH SHORE GAS COMPANY, ATC	)	
MANAGEMENT INC. and AMERICAN	)	
TRANSMISSION COMPANY LLC	)	
	)	
Application pursuant to Section 7-204 of	)	Docket No. 14-0496
the Public Utilities Act for authority to	)	
engage in a Reorganization, to enter into	)	
agreements with affiliated interests	)	
pursuant to Section 7-101, and under the	)	
Public Utilities Act to effectuate the	)	
Reorganization.	)	

**REPLY OF THE PEOPLE OF THE STATE OF ILLINOIS,  
THE CITY OF CHICAGO, AND THE CITIZENS UTILITY BOARD  
IN SUPPORT OF THEIR MOTION TO REMOVE THE CONFIDENTIAL  
DESIGNATION FROM THE LIBERTY INTERIM AUDIT REPORT**

The People of the State of Illinois (“the People” or “the AG”), by Lisa Madigan, Attorney General of the State of Illinois, the City of Chicago (“the City”), by its counsel, and the Citizens Utility Board (“CUB”), by its counsel (collectively “the Governmental and Consumer Intervenors” or “GCI”), pursuant to section 200.190 of the Rules of Practice of the Illinois Commerce Commission (“the Commission” or the “ICC”), 83 Ill. Admin. Code Section 200.190, submit their Reply in Support of Their Motion to Remove the Confidentiality Designation from the Liberty Interim Audit Report (“Reply”). GCI’s Reply addresses the responses submitted by the Commission Staff (“the Staff”) and the Joint Applicants.<sup>1</sup>

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<sup>1</sup> The Joint Applicants are Wisconsin Energy Corporation (“WEC”), Integrys Energy Group, Inc.(“Integrys”), Peoples Energy, LLC, North Shore Gas Company, The Peoples Gas Light and Coke Company

GCI's Motion to Remove the Confidential Designation from the Liberty Interim Audit Report ("the Motion") argued that Staff's confidential designation of the Interim Audit Report ("Interim Report") prepared by The Liberty Consulting Group ("Liberty"), attached as Attachment A to Staff Ex. 8.0, (1) contravenes the Commission's Order in Dockets 12-0511/12-0512 (cons.) that the Liberty Report be public, (2) is unlawful, and (3) contrary to public policy. None of the assertions advanced by JAs or Staff support maintaining the confidential designation. The Commission should grant the Motion and remove the confidential designation from Liberty's Interim Report.

### **ARGUMENT**

Given the arguments made by Staff and the JA, the starting point in disputes about the Commission's treatment of alleged confidential material is important. The governing base line principle is that, under controlling law, confidential treatment of documents in Commission regulatory processes is exceptional and must be specifically justified. That principle is recognized by the Commission, and it is not explicitly disputed by either Staff or the JA. The protective order entered in this case reflects this principle. The protective order allows a party to mark a document as "confidential" or "confidential and proprietary"<sup>2</sup>, but if another party challenges the designation, the party seeking protected status must file a motion *provid[ing] in detail*, for each document or type of document under challenge, *the basis for seeking confidential treatment*. Order Regarding Protection of Confidential and Confidential & Proprietary Information at 7 (emphasis added) ("Protective Order"). Confidential treatment is not a

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("Peoples Gas" or "PGL"), ATC Management Inc., and American Transmission Company LLC. These entities submitted the application that is the subject of this proceeding. Joint Applicants are also referred to as "JAs".

<sup>2</sup> For purposes of brevity, GCI's arguments are intended to apply to documents marked either "confidential" or "confidential and proprietary."

convenience that can be invoked at will, without any factual showing by any party justifying the burdens placed on other parties. The suggestions that GCI must prove that the document deserves public access are simply tactical efforts to shift the burden of proof that rests with parties seeking to impose secrecy on selected aspects of the Commission's proceedings and decisions.

The statutes and cases cited as bases for Staff's and the JA's opposition to GCI's Motion are actually wholly consistent with that principle, and they do not obviate the fundamental requirement for factual and legal showings that justify special treatment as confidential. Arguing, as the Joint Applicants do, that the Commission has the authority to enter protective orders for information that has been shown to be confidential misses the point. *See* JA Resp. at 7-8. The Commission can exercise its authority only after it has been specifically demonstrated that the information warrants confidential treatment. Staff and Joint Applicants have not made such a showing here.

**A. Contrary to Staff's and Joint Applicant's Claims, the Interim Report Is Not a Preliminary<sup>3</sup> or Draft Report.**

Both Staff and the JAs concede that the AMRP is important to the public. Staff Resp. at 6 (the results of Liberty's investigation "are likely to be of great significance to Peoples Gas' ratepayers, this Commission, and the public...."); JAs Resp. at 6 ("The AMRP is important to Peoples Gas and its customers...."). Nonetheless, both parties argue that the Interim Report should be withheld from public view. Staff's and JAs' contentions are wrong and should be rejected.

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<sup>3</sup> It is noteworthy that while Staff and JAs refer to the Interim Report's findings and conclusions as "preliminary" (Staff Resp. at 6; JAs Resp. at 3), that word does not appear in the report.

The primary argument advanced by Staff and the Joint Applicants is that the report is preliminary or not final.<sup>4</sup> *See, e.g.*, Staff Resp. at 3; JAs Resp. at 3-4. However, as GCI explained in their Motion, the Interim Report is an actionable report indistinguishable in significance and effect from the Final Report ordered by the Commission. While it is clear that the Interim Report is not the last report from Liberty in this audit, the report’s findings and recommendations are conclusory with regard to the specific points addressed in the Interim Report. In fact, the auditors emphasize that the reason for submitting their unscheduled Interim Report is [REDACTED]

[REDACTED]

Although Liberty states that [REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Interim Report at S-1 (emphasis added). Liberty goes on to say that [REDACTED],

[REDACTED], namely

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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■ The Joint Applicants also say the Liberty did not suggest that the Interim Report be published, so it is reasonable to assume that the auditors intended that it be designated “confidential.” JAs Resp. at 3. Besides being pure speculation, JAs point is not logical. If Liberty intended that the Interim Report be marked “confidential,” it could simply have marked the report “confidential.” Liberty did not do so. The more logical assumption is that because the auditors did not mark the report as “confidential,” they did not expect the Interim Report would be designated “confidential.”

[REDACTED]  
[REDACTED]  
[REDACTED]

*Id.* Liberty explains that [REDACTED]  
[REDACTED]. In particular, the auditors state that  
its [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

*Id.*

Liberty’s statements show that the Interim Report is a report detailing final findings and recommendations on particular aspects of PGL’s AMRP. These are not ideas that Liberty is mulling over nor are they “draft” in nature. Liberty could not have been more definitive – the findings and recommendations in the Interim Report are [REDACTED]  
[REDACTED] Specific findings and recommendations [REDACTED] do not signify a draft document containing only tentative conclusions.<sup>5</sup>

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<sup>5</sup> The extended excerpt from the Interim Report at pages 3-4 of the JA’s Response is not inconsistent. Although, in that excerpt, Liberty states that the Interim Report [REDACTED] there is no requirement that a report that does not contain a “[REDACTED]” be treated as confidential. There is no requirement that a report of some -- but not all -- [REDACTED] be deemed confidential. The expectation that a later report will make [REDACTED] [REDACTED] does not preclude a non-confidential report of recommendations [REDACTED] at the time of an earlier report.

Moreover, Staff's assertion that the Interim Report is not final or is preliminary contradicts Staff's stated purpose for placing Liberty's report in the record. In its Response, Staff states

Staff's purpose in introducing the Interim Investigation Report into evidence in this docket is to make clear to the Joint Applicants and the Commission the possible scope and scale of the obligations they would be undertaking in the event the merger is approved, and to afford them the opportunity to assure themselves as well as the Commission that they are ready, willing and able to implement the AMRP consistent with the directives in the Commission's Orders in Docket Nos. 09-0166/09-0167 (Cons.) and Docket Nos. 12-0511/12-0512 (Cons.) and with Liberty's findings in the investigation, in light of these obligations.

Staff Resp. at 6.

Staff's purposes cannot be accomplished by compelling a response to (or commitments based on) a document that is preliminary, not final, and, according to Staff witness Stoller, includes findings and recommendations that "may change significantly." Staff Ex. 8.0 at 10:176-177. In other words, it defies belief that Staff would insist that the Joint Applicants provide responses to questions that are based on a document that, as Staff claims, is a draft. While Staff's theory for the confidential designation relies heavily on the argument that the document includes findings and recommendations that may change by the time the Final Report is issued, Staff apparently believes the findings contained therein are sufficiently "final," relevant, and "non-draft" to inform the Commission as to the JAs "readiness, willingness, and ability" to effectively manage the AMRP and commit to implement audit recommendations. *Id.* at 10:176-177. That inconsistency in Staff's assessment of the finality and value of the Interim Report is unexplained and not credible, and such Staff reliance on the Interim Report certainly supports rejection of Staff's argument that the report is not final and must be sealed from public view.

If, as Staff believes, the Interim Report's findings and recommendations are subject to "significant change" (and thereby draft or preliminary in nature), why ask the questions to Joint Applicants at all? The Joint Applicants' responses are of little value if their answers are based on an indefinite document that may change significantly. In considering whether to approve the proposed reorganization, the Commission could not rely on JAs' answers if the document's conclusions were, in fact, subject to significant change.

**B. Joint Applicants' Argument that They Have a "Legitimate Business Interest" in Keeping the Interim Report Confidential Has No Merit.**

At page 4 of their Response, Joint Applicants claim "There is a legitimate business interest in maintaining the confidentiality of preliminary audit reports that are not complete." This claim is baseless. Liberty's Interim Report was prepared for the Commission, not for PGL. Certainly, the Commission does not have a "legitimate business interest" that requires secrecy. The Commission's business is the open, effective, and comprehensive regulation of public utilities. 220 ILCS 5/1-102.

For themselves, the JAs later state that, because Liberty's work is ongoing, they "certainly have a legitimate business interest in maintaining the confidentiality of a preliminary, incomplete report that [REDACTED]." JAs Resp. at 4. JAs make no effort to explain their "legitimate business interest" and none is readily apparent. Since no entity is competing with Peoples Gas to perform the AMRP or its regulated gas delivery, there are no competitive reasons for keeping the Interim Report confidential. The more likely reason the Joint Applicants want to maintain the Interim Report as confidential is to save themselves the embarrassment of a public vetting of how poorly Peoples Gas has managed and implemented the multi-billion dollar program since its inception. Whatever the Joint Applicants' alleged "legitimate business interest" may be, that interest must be weighed against

the public's right to know about the most recent assessment of the AMRP, a program that is, and will continue to have, tremendous impacts on their rates and, potentially, on their safety. Joint Applicants' unsupported claim of an undefined "legitimate business interest" does not warrant keeping the Interim Report confidential.

After making their statement about an ill-defined "legitimate business interest," in the next paragraph, the Joint Applicants identify certain information that, if included in the Final Report, they assert would have to be marked as confidential. JAs Resp. at 4. GCI take no position with respect to that claim. However, there is a stark difference between specifically described information that may merit confidential treatment and claims of confidentiality for some nebulous assertion that the entire Interim Report implicates some unspecified "legitimate business interest."

**C. Staff's and the Joint Applicants' Legal Arguments for Maintaining the Interim Report as Confidential Are Inapposite.**

Both Staff and the Joint Applicants present legal arguments that they assert justify maintaining the Interim Report as confidential. Their respective legal arguments do not withstand scrutiny.

*1. Staff's FOIA Analysis Is Incorrect.*

For its part, Staff analogizes its decision to mark the Interim Report as "confidential" to the terms of the Illinois Freedom of Information Act 5 ILCS 1401/1 *et. seq.* ("FOIA"). Staff Resp. at 4-5. Staff claims that the Interim Report is exempt from disclosure under FOIA because it constitutes a "draft" document. *Id.* at 4, *citing* 5 ILCS 140/7(1)(f). There are at least three problems with Staff's assertion.

First, no party has submitted a FOIA request asking that the Interim Report be produced. Staff has presented the report as part of its pre-filed evidence in a public Commission proceeding

and presumed to designate the material confidential without following the procedure required by the Commission's Rules of Practice. Ill. Admin Code §200.430. Staff's application of FOIA as the governing law in these circumstances is questionable.

Second, as demonstrated in the previous section, the Interim Report is not a draft, the FOIA exception on which Staff relies. There are no indications that the report is a draft. The word "draft" does not appear in the document. There is no watermark or any other indication that Liberty intended that the Interim Report should be considered a draft. Instead, Liberty submitted a report that was not scheduled or required pursuant to its contract with the Commission [REDACTED].

Third, assuming, *arguendo*, that a FOIA analysis is appropriate, Staff omits important portions of FOIA and relevant case law that would require that the Interim Report be made publicly available under FOIA.

Illinois FOIA mandates that the "public policy of the State of Illinois [is] that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials...." 5 ILCS 140/1. The General Assembly added:

... that it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government. It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act.

*Id.* The General Assembly further declared that

Restraints on access to information, to the extent permitted by this Act, are limited exceptions to the principle that the people of this State have a right to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects

of government activity that affect the conduct of government and the lives of any or all of the people. The provisions of this Act shall be construed in accordance with this principle. This Act shall be construed to require disclosure of requested information as expediently and efficiently as possible....

*Id.*

Finally, in amendments to FOIA effective January 1, 2010, the General Assembly added new section 1.2, which states

Presumption. All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by *clear and convincing evidence* that it is exempt.

5 ILCS 140/1.2 (emphasis added).

As Staff notes (Staff Resp. at 4), FOIA enumerates certain exemptions that governmental bodies can assert to decline access to public records. *See* 5 ILCS 140/7. However, as the prior quote makes clear, such exemptions are limited and Illinois courts have consistently held that they should be construed narrowly. *See, e.g., Blue Star Energy v. Illinois Commerce Com'n*, 347 Ill. App. 3d 990, 994 (1<sup>st</sup> Dist. 2007).

Moreover, as discussed in more detail below, Illinois courts have held that documents that are subject to public access (such as the records of ICC proceedings) may not be withheld absent “a compelling reason, accompanied by specific factual findings, [that] justif[ies] keeping them from public view.” *In Re the Marriage of Johnson*, 232 Ill. App. 3d 1068, 1075 (4<sup>th</sup> Dist.1992).

Taken together, the cited portions of FOIA and Illinois case law require the public release of the Interim Report. Relevant Illinois law demands that Staff and Joint Applicants show, by

clear and convincing evidence, a compelling reason why the Liberty Interim Report should not be made public. They have failed to do so.

2. *The Joint Applicants' Legal Analysis Begs the Question.*

The JAs start their legal analysis by stating that they find it “remarkable” that GCI did not mention what the JAs allege is the governing statute – section 4-404 of the Public Utilities Act (“the Act” or “PUA”) – in their Motion. JAs Resp. at 7-8, 1-2. Section 4-404 states that the Commission has the authority to enter protective orders for confidential or proprietary information submitted by any entity. 220 ILCS 5/4-404. Governmental and Consumer Intervenors do not dispute that section 4-404 provides the Commission that authority. However, before the Commission can exercise that authority, there must be a demonstration that the information at issue is, in fact, confidential or proprietary. There is no such showing here. Without such a showing, the Commission’s section 4-404 authority cannot be exercised and has no significance.<sup>6</sup>

The JAs also cite to 13 prior cases in which the Commission entered protective orders. *Id.* GCI are befuddled by this assertion. As with JAs’ claim about section 4-404 of the Act, GCI do not claim that the Commission does not have the authority to enter protective orders. In fact, a protective order has been entered in this case, to which no party objected. The existence of a protective order, however, does not somehow automatically confer perpetual confidential status on a document that has been stamped “confidential.” Rather, the protective order in this case (and in the other cases listed in JAs’ Response) establishes a process whereby parties can

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<sup>6</sup> JAs also cite section 200.430(a) of the Commission’s Rules of Practice as additional evidence that the Commission has the authority to enter orders to protect confidential or proprietary information. JAs Resp. at 8. Like their citation to section 4-404 of the PUA, JAs argument misses the point. There must be a showing that information warrants special treatment before the Commission can exercise that authority.

challenge the confidentiality designation. Once that challenge has been submitted, and if efforts to resolve the dispute have failed, the party claiming confidentiality is required to file a motion demonstrating “in detail” why the information deserves confidential treatment. Protective Order at 7-8. In the abstract, the fact that the Commission has entered protective orders in this case as well as prior cases has no meaning.

JAs also find fault with GCI’s reliance on the *In Re the Marriage of Johnson* (“*Johnson*”) case discussed above. Joint Applicants state that *Johnson* and *Skolnick v. Alzheimer and Gray*, 191 Ill. 2d 214, 231 (2000) “are about judicial records, and those principles do not apply here.” JAs Resp. at 9. Joint Applicants’ interpretation of those cases is wrong.

In *Johnson*, the appellate court stated that courts have found that the public has a constitutional right and a common-law right to access documents that are in a court’s file. *Johnson* at 1073-1074. The *Johnson* court added that “In order to overcome the presumption in favor of access, a party must demonstrate a compelling governmental interest exists, and the restrictions on access are narrowly tailored to meet this governmental interest.” *Id.* at 1074 (emphasis added).

Unless the Joint Applicants can explain why the Commission is uniquely exempt from these constitutional and common law rights, their analysis is wrong.<sup>7</sup> Moreover, if one were to accept JAs’ legal assessment, the public has the right to access court records describing details of the divorce of two private citizens, while expert analysis of a multi-billion dollar project of a regulated monopoly in a proceeding encompassing important statutory public interest determinations must be secret. The Joint Applicants’ contention is ludicrous.

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<sup>7</sup> The JAs state that the Commission has concluded that the *Johnson* court’s findings do not apply to it. If in fact that is the case, the Commission is wrong. In fact, the Commission’s Rules of Practice expressly adopt the evidentiary rules applicable in circuit courts to apply in its proceedings. 83 Ill. Admin. Code 200.610.

Finally, Joint Applicants cite an Illinois Bell proceeding for the supposed proposition that FOIA does not apply to a “utility’s non-public documents.” JAs Resp. at 9, *citing Illinois Bell Tel. Co (“Illinois Bell”)*, ICC Docket No.04-0310 (Order Feb. 24, 2005), at 9-10. That case can be distinguished in at least two ways. First, the *Illinois Bell* case concerned data and documents that belonged to the utility. *Illinois Bell* at 1. That is not the case here. Liberty’s Interim Report was prepared for the Commission, not for Peoples Gas or the other Joint Applicants. While they are implicated by the Interim Report, the document is not theirs.

Second, the Commission concluded that the information and data at issue in the *Illinois Bell* case constituted confidential and proprietary information, and that finding was based entirely on the presence of actual competition in the provision of services encompassed in the data at issue. There has been no showing here that the Interim Report contains confidential or proprietary information. Peoples Gas is a regulated monopoly provider - it has no competition. *Illinois Bell* is inapplicable.

#### D. Joint Applicants’ and Staff’s Claims That Public Release of the Interim Report Might Negatively Impact the Audit Process Should Be Rejected.

The JAs argue that making the Interim Report public may create a “disincentive” to make interim, needed improvements in the AMRP. JAs Response at 7. Staff speculates that “[t]o make an interim report public might interfere with the give and take between the auditor and the company during the pendency of the audit.” Staff Response at 3-4. These arguments should be rejected for at least two reasons.

First, the JAs’ assertion seemingly amounts to a threat of sorts. The JAs seem to be saying that if the public is permitted to view the auditor’s findings to date, Peoples Gas may not make needed improvements in the program going forward. GCI hope that the statement was not intended to mean that Peoples Gas - or other utilities – will not fully comply with Commission-

ordered audits or investigations or would willingly not implement measures necessary to ensure that they are “providing adequate, efficient, reliable, safe, and least-cost service.” 220 ILCS 5/8-102. If, however, that is JAs’ intent, the Joint Applicants’ statement should give the Commission significant pause about approving the requested merger. The public release of the Interim Report has nothing to do with a utility’s service obligations or its obligations to cooperate with a Commission-order investigation.

Second, Staff’s fear that the “give-and-take” might be negatively affected is mere speculation, and like the JA’s assertion, is not relevant to the issue at hand: whether Staff’s claim of confidentiality trumps the public’s right to open and transparent regulatory proceedings. Even if it was relevant to the issue being addressed in the pending Motion (and it is not), Staff cites to no facts or audit findings that support their conjecture. As such, it should be dismissed by the Commission.

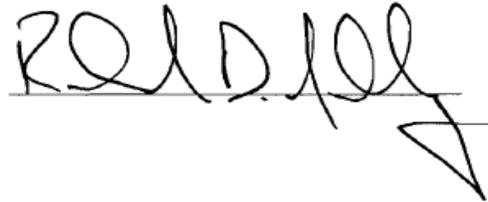
### **CONCLUSION**

For the reasons stated above and in their Motion to Remove the Confidential Designation from the Liberty Interim Audit Report, the People, the City, and CUB respectfully request that the Commission Remove the Confidential Designation of the Liberty Interim Report.

Respectfully submitted,

**PEOPLE OF THE STATE OF ILLINOIS**

By Lisa Madigan, Attorney General

A handwritten signature in black ink, appearing to read "RONALD JOLLY", written over a horizontal line. The signature is stylized and includes a large, sweeping flourish at the end.

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**THE CITY OF CHICAGO**

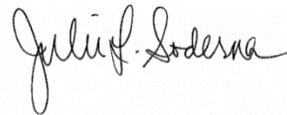


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