

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission)
On its Own Motion)
)
v.)
) ICC Docket No. 02-0067
Northern Illinois Gas Company d/b/a NICOR)
Gas Company)
)
Proceeding to review Rider 4, Gas cost, pursuant)
To Section 9-244(c) of the Public Utilities Act)

AMENDED RESPONSE OF NORTHERN ILLINOIS GAS COMPANY TO THE MOTION FOR PROTECTIVE ORDER OF CITIZENS UTILITY BOARD

Northern Illinois Gas Company d/b/a Nicor Gas (“Nicor” or the “Company”), through its attorneys, hereby submits to the Illinois Commerce Commission (“Commission”) this Response to the Citizens Utility Board’s Motion for Protective Order (the “Motion”).

**I.
Introduction**

On June 27, 2002, the Citizens Utility Board (“CUB”) filed the Motion seeking to have the Commission enter a protective order to preclude Nicor personnel from having access to a fourteen page facsimile document (“Fax”) that CUB received on June 21, 2002. The basis for CUB’s claim, however, is contrary to Illinois law and sound public policy. Nicor personnel are entitled to have access to the subject Fax in order to understand fully the issues now being raised and to prepare, if necessary, its case to address these issues. Accordingly, Nicor requests that the Motion be denied, and that Nicor personnel be allowed to have access to the Fax.

**II.
Summary of Facts**

In its Motion, CUB asserts that it received a Fax from an unidentified Nicor employee” which contained unverified allegations against the Company. (CUB Motion to Reopen Record

¶ 1). To date, Nicor personnel have not seen the Fax or the specific allegations. CUB claims that these untested allegations are sufficient to prompt CUB to request reopening the record in this proceeding. CUB simultaneously requested that the Fax and its contents be kept from Nicor personnel, open only to Nicor's outside counsel who, CUB further requests, cannot even discuss the details of the Fax with their client. (Motion, p. 3). On one hand, CUB relies on its understanding of the significance of the Fax to request the reopening of the record. On the other hand, however, CUB simultaneously understates such significance by simply asserting that "Nicor does not need to see this information." (Motion ¶ 3).

Importantly, a review of the Fax demonstrates that none of its contents contain CUB trade secrets, or confidential and proprietary CUB information. Rather, the Fax appears to contain confidential and proprietary Nicor information.¹

At present, only Nicor's outside counsel has had access to the Fax. In the meantime, the Administrative Law Judges, the Commission Staff, the Cook County States Attorney's Office, and CUB's own expert, has had full and unfettered access to the Fax. Further, as of July 3, 2002, Staff and CUB have propounded to Nicor 41 data requests, some requests with subparts, related to the information contained in the Fax.

III. **Argument**

CUB provides two bases for asserting that the Fax should be subject to a protective order that precludes any Nicor personnel from having access to the information contained therein.

First, CUB relies on Section 200.430 of the Commission's Rules of Practice. (Motion at 2).

¹ Pursuant to a ruling from the Administrative Law Judges, the contents of the Fax have been deemed to be confidential and proprietary. (Tr., pp. 72-73). Such designation, however, does not require the entry of a protective order.

Second, CUB appears to assert an informant's privilege. Neither of CUB's claims are availing. As will be demonstrated below, the Fax does not contain confidential or proprietary information from CUB. Additionally, CUB's attempt to assert an informant's privilege is improper, as it does not have the right to assert such a privilege. Absent any basis to legally withhold the Fax from Nicor personnel, CUB's Motion should be denied and the Commission should determine that Nicor personnel have access to the Fax and its contents.

A. CUB Has Made No Showing That The Information In The Fax Contains CUB Trade Secrets or CUB Confidential And Proprietary Information

Under the Commission's Rules of Practice, the Commission may enter a protective order to "protect the confidential, proprietary or trade secret nature of any data, information or studies." 83 Ill. Adm. Code 200.430(a). Examination of the Fax demonstrates unequivocally that it contains no CUB trade secret information, nor any confidential or proprietary "data, information or studies" belonging to CUB. Indeed, CUB makes no such claim in its Motion. Absent the inclusion of any sensitive CUB information whatsoever, CUB has provided no independent basis upon which to claim the need for a protective order for the Fax under Section 200.430(a).

B. CUB Has No Basis Upon Which To Assert An Informant's Privilege

Only a governmental unit is entitled to invoke the informant's privilege for purposes of protecting certain information. The privilege exists for the protection of law enforcement officers, to preserve the integrity of an investigation, or to protect a confidential informer. Wright & Miller, *Federal Practice and Procedure* § 5702 ("Government is the holder [of the privilege] and the interests the privilege is designed to protect are not the informer's but the government's."). CUB is not a governmental entity and cannot, therefore, invoke the privilege. While, admittedly, CUB is a creature of statute, the Illinois General Assembly provided that

CUB would not receive public funding, and throughout the statute refers to CUB as “the Corporation.” 220 ILCS 10/1 et seq. It is clear that CUB is not a governmental agency. CUB, therefore, is not entitled to invoke the informers’ privilege.

CUB’s reliance on *Cochrane’s of Champaign v. Liquor Control Commission*, 285 Ill. App. 3d 28 (4th Dist. 1996)(“*Cochrane*”) demonstrates the fundamental error in CUB’s position. (Motion ¶ 2). In *Cochrane*, the party asserting the privilege was a government agency, not a corporation. Indeed, the 7th Circuit opinion upon which *Cochrane* cites involves the assertion of the informant’s privilege by another governmental agency, the Department of Labor. *Dole v. Local 1942, Internl. Brotherhood of Electrical Workers*, 870 F.2d 368 (7th Cir. 1989)(“*Dole*”). The *Dole* decision further amplifies the fact that the informant’s privilege may only be asserted by the government. For example, the *Dole* Court, speaking in general, stated:

When asserting the privilege *the government* need not make a threshold showing that reprisal or retaliation is likely, because of the significant policy consideration behind the privilege, as well as the difficulty of proof. Rather, *the government* is granted the privilege as of right.

Dole, 870 F.2d at 372 (citations omitted) (*emphasis added*). The *Dole* court further stated:

The party opposing the privilege may overcome it upon showing his need for the information outweighs *the government’s entitlement to the privilege*.

Id. at 373. What these cases demonstrate is that the informant’s privilege rests only with the government, not an entity such as CUB.

In short, the *Cochrane* decision provides no support for CUB’s attempt to assert the informant’s privilege. Given that CUB cannot assert the informant’s privilege, there is no basis to impose a protective order that precludes Nicor personnel from having access to the Fax.

Accordingly, the Commission should deny the Motion and determine that Nicor personnel can have access to the Fax.

C. Assuming, Arguendo, A Protective Order Is Required, The Scope Of Such Order Must Be Much Narrower Than CUB Proposes

The use of protective orders to prevent a party's access to discovery is strongly disfavored by courts. The rules of discovery are broad. A party is entitled to "full disclosure regarding any matter relevant to the subject matter involved in the pending action." Supreme Court Rule 201(b)(1). *DuFour v. Mobil Oil Corp.*, 301 Ill. App. 3d 156, 160 (1st Dist. 1998) (Illinois Supreme Court rules permit liberal pretrial discovery). Traditionally, broad discovery is encouraged because "the range of relevance and materiality for discovery purposes includes not only what is admissible at trial but also that which leads to what is admissible at trial." *Martinez v. Pfizer Labs. Div.*, 576 N.E.2d 311, 315 (1st Dist. 1991). Accordingly, while the Commission, as courts generally do, has broad powers to determine the scope of discovery, the Commission should be wary of granting protective orders "with reckless abandon." *Andrews Corp. v. Rossi*, 180 F.R.D. 338, 343 (N.D. Ill. 1998) ("[P]rotective orders which would remove portions of the judicial process from public scrutiny cannot be granted with reckless abandon. Without a showing of good cause, this principle simply cannot be ignored.").

"Disclosure is the object of all discovery procedures." *Pfizer* at 315. CUB has failed to make the requisite showing of good cause necessary to overcome this fundamental policy and the healthy mistrust of protective orders. Indeed, as CUB recognizes, a party can request a protective order to maintain trade secrets and to protect confidential business information, if the party can show good cause. (Motion, p. 2). The June 21st Fax is no trade secret, and contains no confidential or proprietary CUB information. On the contrary, it consists of Nicor's confidential and proprietary information and general, unverified claims.

Illinois, as most states, recognizes the existence of a limited governmental privilege to protect law enforcement officers in the course of an investigation. But courts are quick to point out that this is a limited privilege, for “privileges are strongly disfavored because they are in derogation of the search for truth.” *In re Marriage of Daniels*, 240 Ill. App.3d 314, 325, 607 N.E.2d 1255, 1262 (1st Dist. 1992). Consequently, privileges will be “strictly construed as an exception to the general duty to disclose.” *Id.* Therefore, while generally, the government can invoke its privilege to avoid disclosing the identity of a confidential informer, the privilege is not absolute and protective orders should be narrowly tailored not to keep from disclosure more information that the absolutely necessary to protect the identity of the informer. *Dole*, 870 F.2d at 372 (“But the privilege is qualified, it yields when the identification of the informant or of a communication is essential to a balanced measure of the issues and the fair administration of justice.”).

Notwithstanding the fact that CUB is not a governmental entity and, as such, cannot invoke the privilege, the scope of the proposed protective order is too broad and contrary to Illinois public policy. Privileges should not be extended to cover the contents of the document if the identity of the informer can remain protected. As the Supreme Court held in the oft cited case of *Roviaro v. United States*, 353 U.S. 53, 59 (1956), “[t]he scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged.” In this instance, the individual who provided the information is anonymous, even to CUB. As to the contents of the Fax, CUB can only speculate that the identity of the individual would be revealed based upon the information contained in the Fax. Such speculation should not serve as the basis for denying Nicor personnel access to the Fax.

When a party requests to withhold information from the discovery process by means of a protective order, a court, or in this case the Commission, must balance the interest of keeping the information confidential against the opposing party's need for the information. Nicor asserts that the contents of the Fax are potentially very relevant for the preparation of Nicor's case. It is Nicor's contention that while the Fax contains the unverified opinion of an anonymous informant, the suppositions contained therein may be based on attorney-client privileged information or other confidential and proprietary Company information contained in the Fax. Because Nicor has a right to assert its privilege over such information, Nicor needs to evaluate the information to determine whether confidential information has been wrongly disclosed or whether the privilege has been waived. Permitting only outside counsel access to the document is ineffective because the document contains internal references that can only be evaluated by inside counsel and other Nicor personnel. Unless Nicor has access to the contents of the Fax, its right to assistance of counsel will be severely restricted because outside counsel is not in a position where it can effectively represent its client's interests. In sum, restricting Nicor's access to the Fax violates Nicor's due process rights and its very real need to evaluate its contents.

CUB points out that the Commission must balance the competing interests of the parties given the specifics of the case. *Pfizer*, 576 N.E.2d at 316. In this case, the facts are simply not on CUB's side. While protecting the identity of an individual is an important public goal, CUB forgets that the interests of employees are adequately protected in Illinois where courts have carved out exceptions to the employment-at-will doctrine recognizing a cause of action for retaliatory discharge. *Palmateer v. Int'l Harvester Co.*, 85 Ill.2d 124, 128, 421 N.E.2d 876, 878 (1981).

In addition, given the facts before the Commission, CUB has failed to demonstrate the need for the broad scope of its proposed protective order. Nicor seeks access to the contents of the Fax for its own protection and to effectively prepare its case. The Commission must balance the competing interests, consistent with Illinois law and policy, and it must construe privileges strictly and “as an exception to the general duty to disclose.” *In re Marriage of Daniels*, 240 Ill. App. 3d at 325. Accordingly, while the Commission has a broad discretion to fashion a protective order, it must do so narrowly and limit the protection only to the identity of the informant. *Culinary Foods, Inc. v. Raycheme Corp.*, 151 F.R.D. 297, 308 (N.D. Ill. 1993) (faced with competing versions of protective orders, the district court meticulously analyzed them and granted limited protection only where the party was able to show good cause). Because of their dislike of privileges, courts have repeatedly refused to extend the scope of established privileges as well as to adopt new privileges. *See, Powers v. Chicago Transit Authority*, 890 F.2d 1355 (7th Cir. 1989) (refusing to adopt a “confidential-informant-in-litigation” privilege, the court demanded disclosure of the informant’s identity because it consider it necessary to ascertain whether confidential information had been disclosed); *see also, People ex rel. Birkett v. City of Chicago*, 184 Ill. 2d 521, 528, 705 N.E.2d 48, 51 (1998) (“[T]his court has repeatedly concluded that the extension of an existing privilege or establishment of a new one is a matter best deferred to the legislature.”).

It remains Nicor’s position that the Fax should be made available to all Nicor personnel. At a minimum, Nicor’s in-house counsel must have access to the Fax. Without such access, Nicor cannot determine whether the information revealed in the Fax is subject to an attorney-client privilege, nor can in-house counsel properly advise its client with respect to the claims found in the Fax. Therefore, if the Commission determines that a protective order is necessary, such an order should allow for the Company’s in-house counsel to have access to the Fax.

IV.
Conclusion

In sum, the basis for CUB's proposed protective order is legally deficient, unnecessary, and against sound public policy. While the burden is on CUB to demonstrate good cause for the imposition of its proposed protective order, it has not done so. Nicor, meanwhile, has shown that it has a palpable need to see the contents of the Fax. At a minimum, Nicor's in-house counsel should have access to the Fax.

Dated: July 10, 2002

Respectfully submitted,

Northern Illinois Gas Company,
d/b/a Nicor Gas

By: _____
One of its attorneys

John E. Rooney
Michael Guerra
Sonnenschein Nath & Rosenthal
233 South Wacker Drive
Chicago, IL 60606
(312) 876-8000
jrooney@sonnenschein.com
mguerra@sonnenschein.com

Russ M. Strobel
General Counsel
Nicor Gas
1844 Ferry Road
Naperville, IL 60563

CERTIFICATE OF SERVICE

I, John E. Rooney, hereby certify that I served a copy of the Amended Response of Northern Illinois Gas Company to the Motion for Protective Order of Citizens Utility Board upon the service list in Docket No. 02-0067 by email on July 10, 2002.

John E. Rooney