STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

CITIZENS UTILITY BOARD	)	
	)	
Complaint requesting the ICC	)	
to order Peoples Energy Services	)	Docket No. 03-0592
to cease and desist misleading	)	
marketing of gas offering	)	

INITIAL BRIEF OF PEOPLES ENERGY SERVICES CORPORATION

Pursuant to Section 200.800 of the Illinois Commerce Commission's Rules of Practice (83 Ill. Admin. Code §200.800) and the schedule established by the Administrative Law Judge, Peoples Energy Services Corporation ("PE Services") hereby files its Initial Brief in the above captioned proceeding.

Statement of Facts

PE Services is an alternative gas supplier ("AGS") certified by the Illinois Commerce Commission ("Commission") to provide service to residential customers in the Northern Illinois Gas Company ("Nicor Gas"), North Shore Gas Company ("North Shore") and The Peoples Gas Light and Coke Company service territories. Docket No. 02-0506, Order at 1, September 25, 2002. In early September 2003, PE Services distributed a one-page offer to 200,000 consumers in the Nicor Gas and North Shore service territories. The front side of the offer, hereinafter "Offer Letter," provided a general description of the offer while the back side of the offer, hereinafter the "Agreement," detailed the price, terms and conditions of the offer. Together, the Offer Letter and the Agreement constitute the "Offer." This one-page document fully described the terms and conditions, including charges and fees, of the Offer.

The Citizens Utility Board ("CUB") filed, on September 30, 2003[1], a Verified Complaint (the "Complaint") alleging that the Offer was misleading because there are terms that appear on the back side of the Offer in the Agreement that do not appear on the front side of the Offer in the Offer Letter. More specifically, CUB alleged that the Offer Letter did not adequately disclose the details regarding the price of the Offer and terms and conditions related to termination. Complaint at ¶¶ 15-23. CUB further alleged that the use of the Peoples Energy name and logo was, in the context of the Offer, misleading. Complaint at ¶ 27. Finally, CUB claimed that the statement in the Offer Letter that the Offer was limited to 2,000 customers was problematic. Complaint at ¶¶ 24-26. CUB also filed an amended compliant on October 30, 2003 (the "First Amended Complaint"). The First Amended Complaint alleged that inbound and outbound telephone conversations regarding the Offer did not adequately disclose the terms and conditions of the agreement and did not contain an affiliated interest disclaimer. First Amended Complaint at ¶¶ 4-5.

PE Services answered the Complaint on October 21, 2003, and answered the First Amended Complaint on November 5, 2003. In addition to PE Services' answers, Wendy Ito, the Director of Business and Planning Development for PE Services, submitted three affidavits responding to CUB's allegations and to the recommendations and allegations of Commission Staff member Joan S. Howard. Ms. Howard submitted two affidavits on behalf of the Commission Staff. CUB submitted no affidavits and did not offer a witness in this proceeding. On November 21, 2003, an evidentiary hearing was held where Ms. Ito testified for PE Services and Ms. Howard testified for Staff. At the conclusion of that hearing, the record was marked heard and taken.

[1] On October 1, 2003, CUB filed a corrected Complaint that CUB stated corrected formatting errors.

Argument

I. The Offer Letter and Agreement comply with all of the standards set forth in the applicable laws.

A. The Offer Letter and the Agreement comply with the requirements of 220 ILCS 5/19-115(f) and the Nicor Gas and North Shore Tariffs.

Article XIX of the Public Utilities Act ("Act") is the Alternative Gas Supplier Law. 220 ILCS 5/19-100 *et seq*. Section 19-115 sets forth the obligations of an AGS with respect to marketing and requires that "[a]ny marketing materials which make statements concerning prices, terms, and conditions of service shall contain information that adequately discloses the prices, terms and conditions of the products or services." 220 ILCS § 5/19-115(f)(1). Rider 16 of Nicor Gas' tariff and Rider AGG of North Shore's tariff include a similar requirement in the "standards of conduct" applicable to alternative gas suppliers marketing to residential customers. The principal issue in this case is, therefore, whether the Offer Letter and Agreement "adequately disclose[] the price, terms, and conditions" of the Offer.

The complainant, CUB, in order to prevail, must prove by a preponderance of the evidence that the prices, terms and conditions of the Offer were not adequately disclosed. Diehl v. The Peoples Gas Light and Coke Co., 2003 Ill. PUC LEXIS 307, at *4 (2003). For the reasons discussed in Section II, *infra*, the Commission must adopt an objective standard in construing the "adequate disclosure" requirements of Section 19-115(f).

The Commission has addressed the requirements of Section 19-115(f) in only one case. Santanna Natural Gas Corp. d/b/a Santanna Energy Services, Docket No. 02-0441, Order dated November 7, 2002 ("Santanna"). The Commission did not define the term "adequate disclosure" in that case. Additionally, the facts of Santanna are

dissimilar to those in the present matter. Santanna, CUB, and the Staff had received thousands of customer complaints which raised concerns regarding the adequacy of Santanna's marketing practices. Santanna at ¶ 86. Moreover, the Staff expressed concerns regarding the managerial abilities of the company where, for example, marketers were altering contracts without the authority or knowledge of Santanna, and marketers misrepresented their identities to consumers. Santanna at ¶¶ 26-45.

In the present matter, there are no such concerns. CUB failed to identify a single customer who complained of confusion and instead relies on unsupported conclusions in the Complaint that the Offer is deficient. Ms. Howard cited no instance of a customer complaint in response to the Offer. There are no allegations related to PE Services' managerial abilities. Santanna is not useful precedent in the instant case.

The Commission, in its July 5, 2001 order approving changes to Nicor Gas' Riders 15 and 16 (Nicor Gas' residential open access program called "Customer Select"), offered some guidance regarding the purpose of the "adequate disclosure" requirement. In that order, the Commission directed Nicor Gas to add certain provisions related to marketing materials, including the language at issue in this proceeding, to its standards of conduct. The Commission explained that "[i]t is important for customers, particularly less sophisticated customers, to have the ability to easily evaluate service offers from alternative suppliers." Docket Nos. 00-0620 & 00-0621 Cons. Order dated July 5, 2001 (adopting the language of 220 ILCS 5/16-115A(e) at p. 65) ("Nicor Gas"). Notably, the Commission rejected proposals that it adopt more detailed disclosure requirements, such as uniform price disclosures and uniform billing formats. Id. at 63-69. It would appear that marketing disclosures should therefore be adequate to allow a

customer to evaluate service offers. Moreover, it would appear that "adequate disclosure" does not require a particular presentation of information, nor did the Commission want to dictate the information that must be included. Drawing on the Nicor Gas order, this interpretation can provide an objective basis by which to measure compliance. CUB must prove that the Offer did not provide sufficient information for a reasonable person to evaluate the service offering.

For the reasons detailed below, the Offer met this standard, and CUB has not met its burden of proof. CUB has provided no direct evidence of confusion or that the disclosures were not adequate. Instead, CUB claims that the Offer is misleading because certain terms are not described in the Offer Letter (what it misleadingly calls the "original solicitation") and are included in the Agreement, which CUB neglects to acknowledge was an integral part of the "original solicitation." Mere speculation about whether marketing material could be confusing or how a customer would react to the Offer cannot be determinative of the issues in this case.

1. The Offer includes the complete terms and condition of PE Services' service offering.

In September 2003, PE Services marketed a fixed price gas offer to customers by distributing the Offer Letter and Agreement to 200,000 consumers in the Nicor Gas and North Shore service territories. Together, the Offer Letter and Agreement, which are in the form of a one-page document, constitute the Offer and they fully describe the price, terms and conditions of the Offer. The Offer Letter provides a brief description of the Offer. In particular, the Offer Letter states that the price of gas to the customer will be 62¢ per therm until September 2005. The Offer Letter also explains that the customer will receive a single bill and payment options are available. The Agreement

provides the complete terms and conditions of the Offer that is summarized in the Offer Letter. In particular, the Agreement describes in detail the services that PE Services provides, the price for those services, term of the agreement, termination rights, termination charges, payment requirements, the right of rescission, process for the customer to raise disputes with the Company or the Commission and normal and customary contract provisions such as contract assignment, *force majeure* and choice of law. PE Services Ex. 1 at ¶ 2; Ex. A of PE Services Ex. 1.

To enroll in this Offer, customers could complete and return the card attached to the Offer or call the toll free number listed on the Offer. PE Services Ex. 1 at ¶ 5. If the customer elected to enroll by returning the card attached to the Offer, the customer was required to sign the card under the following statement: "I have read and agree to the terms and conditions of the Natural Gas Agreement." Ex. A, page 1 of 2, of PE Services Ex. 1. If the customer elected to enroll by telephone, the conversation and confirmation of the transaction in which the customer verifies account information, agrees to take service from PE Services and consents to the term, pricing, and rescission rights was recorded. PE Services Ex. 1 at ¶ 5. After enrolling by mail or by telephone, PE Services mailed a confirmation letter with another copy of the Agreement and provided the consumer with three business days to rescind the agreement. Id. at ¶ 6. The Offer included sufficient information for the consumer to evaluate the service offered by PE Services.

2. The Offer Letter and Agreement adequately disclosed the terms and conditions of the agreement.

CUB argues that the Offer Letter was misleading because there are terms and conditions set out in the Agreement that are not also included in the Offer Letter.

Complaint at ¶ 6. Similarly, Staff claims that the Offer Letter is misleading because it fails to provide "full disclosure." ICC Staff Ex. 1.0 at p. 7. Claims that the Offer Letter is inadequate because it does not contain the full terms of the agreement are flawed because they ignore the totality of the marketing effort and would prevent suppliers from providing customers a summary of their service offerings.

PE Services mailed the Offer Letter and Agreement together as the front and back sides of one document. The existence of the Agreement on the back side of the Offer Letter is apparent from even a cursory look at the Offer, and that agreement is referenced on the acceptance card beneath the Offer Letter. Ex. A, page 1 of 2, of PE Services Ex. 1. Together, the Offer Letter and Agreement are a single marketing document, and they comply with the requirements of Section 19-115(f). A determination to the contrary would create a situation wherein AGS would be unable to summarize the material contained in their contracts. CUB and Staff would evidently require that every document in a marketing effort contain all of the prices, terms, and conditions of the offer. Such an interpretation would hamper the ability of an AGS to provide a summary of its services and would essentially require that every marketing effort include the full contract on each page. Additionally, it is unclear how telemarketing could ever satisfy such a standard, short of the telemarketer reading the contract to the consumer. Yet, Nicor Gas and North Shore permit enrollment by telephone. Nicor Gas at p. 72; North Shore Gas Company, Docket No. 01-0469, Order dated March 5, 2002, at p. 68. This interpretation would result in complex and confusing communications to the consumer. The Commission should reject CUB's claims.

a. The pricing was adequately disclosed in the Offer as part of the Agreement.

The Offer Letter and Agreement provide a clear description of the Offer price and terms in plain language. Both the Offer Letter and Agreement state that the commodity portion of the bill will be 62¢ per therm. Additionally, the Agreement states that the price includes all charges assessed or collected by the utility, on a cost pass-though basis. Finally, the Agreement states that there is a $2.95 monthly administrative fee.

i. The monthly administrative fee is clearly disclosed in the Offer.

CUB argues that the impact of the administrative fee is not clearly revealed. CUB further speculates that the monthly administrative fee might cause a consumer's bill to be higher under the offer than if that consumer remained with regulated utility service. CUB also argues that the Offer Letter leads customers to believe that they are locking in a price for gas that is lower than what they will pay. Complaint at ¶ 22. These arguments are without merit.

The three components of the price are clearly set forth in the Agreement. The Offer Letter clearly and accurately states that the price per therm of gas consumed is 62¢. The pricing information that the customer needs to evaluate the offer relative to utility service or other non-utility suppliers is disclosed. CUB attempts to cloud the issue by presenting a hypothetical calculation of the monthly administrative fee as a per therm charge to claim that the Offer exceeds 62¢ per therm.[2] The price per therm of gas consumed by the customer will be 62¢. Nothing in the Agreement changes the

[2] PE Services notes that in the Nicor Gas Customer Select case described above, CUB advocated that the Commission require suppliers to adopt a type of uniform price disclosure. The Commission rejected these proposals and concluded that such efforts would "mislead customers and mischaracterize the prices and terms of suppliers." Order, dated July 5, 2001, Docket Nos. 00-0620 and 00-0621 Cons., p. 72. Under the guise of adequate disclosure, CUB is essentially trying to impose a requirement that the Commission already rejected.

commodity price. The monthly administrative fee is not a per therm charge, and it is unrelated to the price of gas. Moreover, it would be illogical for PE Services to attempt to quantify the impact of the $2.95 monthly administrative fee on a consumer's monthly bill when it would clearly depend on the amount of gas used by the customer. Additionally, how this might compare with utility service adds another layer of speculation, as the utility's per therm gas charge changes each month. The existence of the $2.95 monthly administrative charge is clearly disclosed on the Agreement. Any attempt to provide a description of the potential impact on a consumer's bill would only create confusion due to the impossibility of predicting the relative impact. Accordingly, CUB's claim should fail.

ii. The existence of the pass-through cost is included in the Offer in a comprehensible manner.

Staff, like CUB, claims that the price per therm exceeds 62¢ and that the utility charges to be passed through are unclear. Again, the price per therm of gas consumed by the customer will be 62¢. Nothing in the Agreement, including the utility pass through charges, changes the commodity price. The existence of a pass-through of utility charges is clearly indicated in Paragraph 4 of the Agreement. Ex. A, page 2 of 2, of PE Services Ex. 1, Agreement at ¶ 4. As with the administrative charge, it would not be feasible to present these charges in a per therm format. Even listing specific charges in the Offer Letter or Agreement could cause confusion because utility bill limitations mean that the charges would not all appear as line items on the bill. R. 52. Also, the various charges that comprise the pass-through charge are complex and are based upon determinations beyond the control of PE Services. R. 67-70. The charges are subject to readjustment by other companies more than once each year so that PE

Services cannot provide consumers with a set pass-through price. Id. Also, the names of the charges differ in the Nicor Gas and North Shore territories. R. 52. Finally, like the administrative charges described in the preceding section, one of the charges is not a per therm charge (R. 62-63) and converting it to a per therm basis could be misleading and confusing.

PE Services clearly disclosed the existence of the utility pass-through charges and adequately disclosed the nature of these costs in a manner designed to avoid confusion. An over-inclusive breakdown and explanation of each element of the pass-through charge would confuse consumers rather than provide a clear understanding of the cost. Accordingly, Staff's claim that the utility pass through cost was not adequately disclosed should fail.

b. The payment requirements are adequately disclosed in the Offer.

CUB contends that the Offer Letter does not advise customers that the payment requirements differ from those of the utility. Specifically, CUB argues that the timing of required payments is unclear and that the time for payment is too short. Complaint at ¶ 23. Paragraph 5 of the Agreement, entitled "**Payment**," clearly states that "payment is due 10 days after the invoice date." Ex. A, page 2 of 2 of PE Services Ex. 1, Agreement at ¶ 5. Therefore, the payment provisions are adequately disclosed. Note that PE Services has stated that it uses the utility single bill option and waives this provision so that bills are due on the utility due date. PE Services Ex. 1 at ¶ 14. More importantly, CUB's contention that the time for payment is too short is not relevant. The issue in this case is the adequacy of disclosure and not CUB's opinion about the sufficiency of the payment terms.

c. The Agreement adequately disclosed the details of the termination provisions of the Offer.

CUB argues that the Offer did not contain an adequate disclosure regarding termination of the agreement. Complaint at ¶¶ 16-21. CUB asserts that the various provisions it describes are material facts that PE Services "omits from the original solicitation and buries in the Agreement." CUB's use of the term "original solicitation" is misleading. It implies, incorrectly, the there was a document that constituted the "original solicitation" and then there was another document that constituted the agreement. In fact, as explained above and shown by the Offer included as Exhibit A to PE Services Ex. 1, there was only one document. Moreover, review of the Agreement reveals that CUB's arguments are without merit. CUB's complaint is really that it does not like the provisions in question and not that any legal deficiency exists.

i. The Offer adequately disclosed the provision applicable to pricing notices.

CUB complains that PE Services can change the price and the change is binding if the customer does not object in writing. Complaint at ¶ 16. In fact, Paragraph 7 of the Agreement sets forth a process by which PE Services may submit pricing notices to the customer. That process is clearly described. Ex. A, page 2 of 2, of PE Services Ex. 1, Agreement ¶ 7. Additionally, Ms. Ito explained that customers receiving fixed price service pursuant to the Offer will not receive any pricing notices proposing a price increase during the two-year term of the agreement. PE Services Ex. 1, ¶ 11.

ii. The Offer adequately disclosed the circumstances under which a customer may be returned to utility service.

CUB quotes language defining when PE Services can return the customer to utility service and then mischaracterizes the language by concluding that PE Services

can terminate service "based upon any circumstances." Complaint at ¶ 17. The relevant provision is clearly set forth in Paragraph 7 of the Agreement. It states that PE Services may terminate the agreement where "there are changes to rules, regulations, tariffs or procedures or other circumstances that adversely affect Company's ability to serve Client or provide the price." Ex. A, page 2 of 2, of PE Services Ex. 1, Agreement at ¶ 7. This provision is intended to protect PE Services in the event of a material change in circumstances and not as a means to terminate the agreement "based upon any circumstances" as alleged by CUB. Moreover, this termination right is adequately disclosed in Paragraph 7 of the Agreement.

iii. The Offer adequately disclosed the *Force Majeure* provision.

CUB characterizes the *force majeure* clause as an "escape clause." Complaint at ¶ 18. Again, CUB mischaracterizes the provision as allowing PE Services to nullify the agreement "for any reason it chooses." *Force majeure* is defined in the Agreement as an event "beyond the reasonable control of the non-performing party and that could not be remedied by the exercise of due diligence." Ex. A, page 2 of 2, of PE Services Ex. 1, Agreement at ¶ 6. Some contracts embellish this basic definition with a non-exclusive listing of events, such as acts of God. See, e.g., Central Illinois Public Service Company v. Atlas Minerals, Inc., 965 F Supp 1162, 1166 (C.D. Ill. 1997). CUB (Complaint at ¶ 18) and the ALJ (R. 80-81) addressed this. However, with or without such a non-exclusive list of exemplary events that would constitute *force majeure*, such clauses are interpreted within the context of the parties' bargain. In fact, in the case cited by CUB, the Court stated that: "A *force majeure* clause is not intended to buffer a party against the normal risks of a contract. The normal risk of a fixed-price contract is

that the market price will change." Northern Indiana Public Service Company v. Carbon County Coal Company, 799 F. 2d 265, 275 (7th Cir. 1986). The PE Services' contract uses an abbreviated definition, rather than a listing of exemplary events, but the brevity of the definition does not expand the applicability beyond events that would be considered *force majeure*. As Ms. Ito explained, changes in the wholesale gas market do not affect the price. PE Services Ex. 1 at ¶ 10. (Also see R. 59, "I can't think of a force majeure clause that would change that price.") The force majeure clause is clearly disclosed and is reasonable.

iv. The Offer adequately disclosed the price change provisions, including the index price.

CUB erroneously argues that PE Services can change the customer's price, including to an index price, at any time, or return the customer to utility service. Complaint at ¶ 19. The contention that PE Services can return customers to utility service at any time for any reason is wrong and ignores the plain words in the contract (see Section I.A.2.c.ii *supra*). The argument that PE Services can simply change the price on a whim is likewise wrong. At no time can PE Services compel a customer to accept a price other than one the customer accepts. The customer has a contractual right to terminate the contract on sixty days notice prior to the end of any term. The customer has a contractual right to object to and reject any pricing offer. With respect to the Offer, during the initial two-year term, PE Services cannot force a customer to accept any price other than 62¢ per therm. The customer need only object to the proposal. Moreover, Ms. Ito explained that customers receiving fixed price service pursuant to the Offer will not receive any pricing notices proposing a price increase during the two-year term. PE Services Ex. 1, ¶ 11.

v. The Offer adequately discloses the termination charges.

CUB argues that the Offer does not adequately disclose the termination charges that apply should a consumer elect to cancel the agreement prior to the end of the initial term or an extension. CUB refers to these charges as a penalty and argues that the terms are hidden so that a consumer would not read or understand the fee. Complaint at ¶ 20.

The termination charges are specifically described in Paragraph 7 of the Agreement, which is entitled "**Term, Termination & Termination Charges.**" Ex. A, page 2 of 2, PE Services Ex. 1, Agreement at ¶ 7. Contrary to CUB's argument, the existence of a termination fee is not hidden. The title of Paragraph 7 clearly indicates that the Offer contemplates a termination charge. Moreover, Paragraph 7 states that where a customer terminates the agreement prior to the end of the term, PE Services will assess a termination fee of 15¢ per therm that would have been used during the remainder of the agreement, based on PE Services' good faith estimate as to the number of therms. The termination fee is adequately disclosed in the Offer.[3]

vi. The Offer adequately disclosed the term of the agreement.

CUB contends that customers are misled to believe that the Offer will continue only until September 2005. According to CUB, the Offer does not end in September 2005 "if Peoples Energy Services decides not to cancel it." Complaint at ¶ 21. The plain words of the agreement show that either party can cancel the agreement.

[3] PE Services explained that a termination fee is necessary because, in order for PE Services to guarantee a fixed price to customers for an extended term such as two years, PE Services must make firm contractual commitments for supply. If a customer terminates the agreement before the end of the term, PE Services still has contractual commitments to its supplier for gas that the customer is no longer taking. PE Services Ex. 1 at ¶ 8.

Specifically, the agreement states, in bold type and capital letters, that: "This Agreement will extend automatically from year-to-year after the initial term unless cancelled by either party on 60 days written notice prior to the end of the initial term or prior to any extension." Ex. A, page 2 of 2, of PE Services Ex. 1, Agreement at ¶ 7. Not only is the termination right clearly and adequately disclosed, but CUB's characterization of the provision is wrong on its face.

B. The PE Services logo complies with all statutory requirements and the Offer included the required affiliated interest disclaimer.

Peoples Energy Services Corporation is a wholly owned subsidiary of Peoples Energy Corporation, which is a public utility holding company. It is affiliated with The Peoples Gas Light and Coke Company, an Illinois public utility. Because of this affiliation, certain requirements apply to the use of a common name and logo. PE Services' marketing materials that are at issue in this proceeding used the common name and logo and complied fully with the applicable Commission requirements.

1. The appearance of the logo complies with applicable rules.

CUB opined that the use of the logo was, in the context of this offer, somehow misleading. Complaint at ¶ 27. Staff described the font size and appearance of PE Services' logo and concluded with the statement that the affiliated interest disclaimer did not appear in what Staff called the "marketing letter." ICC Staff Ex. 1.0 at pp. 3-4.

CUB and Staff take issue with PE Services' use of the Peoples Energy name and logo in its materials. The use of that name and logo is expressly permitted under Commission rules. Section 550.30(b) states "[n]othing in subsection (a) shall be construed as prohibiting an affiliated interest in competition with ARGS from using the

corporate name or logo of a gas utility or gas utility holding company."[4] 83 Ill. Admin. Code Sec. 550.30(b). Moreover, Section 550.30 does not regulate the appearance of logos. The word "services" is clear on the PE Services logo. Additionally, the logo appearing on the Offer Letter clearly states that it is Peoples Energy Services in a legible font and size. PE Services' use of the name and logo is acceptable under Illinois law.

2. PE Services displayed the required affiliate disclaimer.

The Commission's rules require certain utility affiliates, in limited circumstances, to include a disclaimer that the affiliate is separate from the regulated utility. Specifically, Section 550.30(c) states, in pertinent part, that:

> When an affiliated interest in competition with ARGS markets or advertises to the public using the natural gas utility's name or logo, it shall include a legible disclaimer that states:
> 1) that the affiliated interest in competition with ARGS is not the same company as the gas utility;
> 2) that the prices of the affiliated natural gas supplier in competition with ARGS are not regulated by the Illinois Commerce Commission;
> 3) that a customer does not have to buy products or services from the affiliated interest in competition with ARGS in order to receive the same quality service from the gas utility.

83 Ill. Admin. Code Sec. 550.30(c).

The rule does not contain any detail regarding the appearance of the disclaimer, other than it must be legible. Moreover, the rule provides no direction as to how it is to be conveyed in the context of telemarketing. PE Services included the required disclaimer as a part of the Offer on the Agreement and then again in connection with a confirmation letter to consumers who still had an opportunity to cancel the agreement

[4] Subsection (a) states that "[a] gas utility shall neither jointly advertise nor jointly market its services or products with those of an affiliated interest in competition with ARGS." 83 Ill. Admin. Code §550.30(a). This provision is not at issue in this proceeding as there was no joint marketing or advertising.

without penalty. PE Services Ex. 1 at ¶ 6. The text of the disclaimer complies with the requirements of Section 550.30.

The fact that the disclaimer appeared on the Agreement and not on the Offer Letter ignores that the Agreement was inseparable from the Offer Letter. The required affiliated interest disclaimer appears at the bottom of the Agreement, on the back of the Offer Letter, so that the Offer complied with the requirements of Section 550.30.

Additionally, CUB argues that the telephone conversations between customers and PE Services did not contain the required disclaimer. First Amended Complaint at ¶ 5. However, PE Services only called those individuals to whom it mailed the Offer and thus had received the disclosure contained on the Agreement. Similarly, those individuals who received the Offer and the required affiliated interest disclaimer had the option to call PE Services regarding the Offer. Moreover, those consumers who opted to accept the Offer by telephone were required to verify the decision to accept the Offer. PE Services Ex. 2 at ¶ 3. The required disclaimer is contained as part of the verification script so that consumers again received the disclaimer, this time orally. Id. Finally, the consumers who accepted the Offer, by telephone or by mail, received a confirmation letter with a copy of the Agreement that again contained the required disclosure. The confirmation letter also provided the consumer with the opportunity to rescind the agreement.

Contrary to CUB's assertion (First Amended Complaint at ¶ 5), Section 550.30 does not state that the required affiliate disclosure must be made in what CUB calls the "initial sales call." Although it is not clear what CUB means by the "initial sales call," CUB seems to refer to the portion of the call during which the customer and the

marketing representative discuss the offer. In fact, the verification process is performed as part of the telephone call in which the customer accepts the offer. After the customer accepts the offer, the person handling the sales call verifies the acceptance, which includes the disclaimer. PE Services Ex. 2, ¶ 3. In any event, the rule does not specify the manner or timing of the required disclosure in the context of telemarketing. Moreover, PE Services provided the required disclosure to consumers on numerous occasions in both a written and, in the case of telephone orders, verbal format. Accordingly, PE Services complied with the requirements of Section 550.30(c).

C. Stating that the Offer was limited to 2,000 customers was not misleading.

The Offer Letter stated that the Offer was available to the first 2,000 customers. CUB claims that, because more than 2,000 customers may have been able to sign up for the Offer, this is misleading. CUB further opines that there is "no logical reason" to limit the Offer to 2,000 customers "other than to create the impression that customers must act immediately or lose out." Complaint at ¶ 3.

CUB's speculation aside, there is an obvious and sound reason why the Offer was limited to 2,000 customers -- PE Services had secured supply that it estimated would be sufficient to support the offer it was making to only that many customers. Prior to making a fixed price offering, PE Services contracts with its gas suppliers for sufficient supply to support the offer it is making. PE Services determines the number of customers to which it can extend an offer based on the amount of supply for which it contracts and estimated customer usage. Subsequent to mailing the Offer, PE Services was able to secure additional supply that would allow it to serve additional customers at the same price and for the same two-year term. PE Services Ex. 1 at ¶ 4.

Unlike other products, the amount of gas supply needed to serve exactly 2,000 customers cannot be determined with precision. For example, if a supplier offers to sell 10 widgets to the first 2,000 customers, it knows with certainty that it needs to secure 20,000 widgets. By contrast, an offer to meet the full gas requirements of residential customers for two years is not susceptible to a perfect estimate. It is easily understandable why PE Services could have found itself with sufficient supply to extend the offer to serve more customers. Moreover, natural gas is a commodity that is traded in a liquid market. The fact that market conditions permitted PE Services to procure additional supply at a price that allowed it to make the 62¢ offer to more customers is foreseeable. From these basic facts about supply and demand, it is unreasonable to leap to the conclusion that the 2,000 customer limit was imposed for some untoward reason. Indeed, Ms. Ito explained that PE Services, in the case of other offers, has had to reject customers because of supply limitations. PE Services Ex. 1 at ¶ 9. Surely, the adequate disclosure requirement cannot be so rigid as to require PE Services to abruptly cease marketing an offer when it reaches a limit but finds that it is able to meet the demands of additional customers who request service.

II. The Commission must adopt an objective standard in construing and applying Section 19-115.

Section 19-115 does not define the term “adequate.” As discussed in Section I, *supra,* the Commission has not defined the term “adequate” in case law interpreting the statute, in the context of Section 16-115A(e) of the Act, which imposes a substantially similar requirement on marketing by alternative retail electric suppliers, or when it directed Nicor Gas and North Shore to include such a requirement in their residential unbundling tariffs.

The word “adequate” is defined as “legally sufficient” by Blacks Law Dictionary. BLACKS LAW DICTIONARY 40 (7th ed. 1999). It is also defined as “as much or as good as necessary for some requirement or purpose; fully sufficient, suitable, or fit.” WEBSTER’S UNABRIDGED DICTIONARY 24 (2d ed. 1997). Neither definition provides guidance in the present matter because the statute does not indicate for what purpose the information must be “adequate.” Without a specified purpose or requirement to serve as an objective reference for the application of the adequate disclosure standard, Section 19-115(f) simply allows for a subjective determination of compliance and creates a situation where any person’s opinion may serve as the basis for a claim of inadequate disclosure.

To be legally enforceable, a statute must provide clear standards. Where a statute is impermissibly vague, application of the statute is a violation of the right to due process. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) (“Flipside”). Application of Section 19-115(f) using subjective criteria would constitute a violation of PE Services’ right to due process. A statute is void for vagueness under the due process clause if the terms are so vague that people of ordinary intelligence must guess at the meaning of the statute and differ as to its application. International Soc. for Krishna Consciousness v. Rochford, 585 F.2d 263, 270 (7th Cir. 1989). The Supreme Court has stated that a statute must first “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.” Flipside, 455 US at 498 (quoting Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)). In other words, a

court should consider the two dangers of lack of notice to potential offenders and standardless enforcement. Both concerns are implicated by the application of Section 19-115 to the facts in the present matter.

Without a clear, objective standard, Section 19-115(f) is impermissibly vague and its application in a subjective manner would constitute a violation of PE Services' due process rights. Drawing on the limited guidance available from the Commission, an interpretation under which CUB must prove that the Offer did not provide sufficient information for a reasonable person to evaluate the service offering would be an objective way of construing Section 19-115(f).

III. PE Services has acted in good faith to clarify any alleged inadequacy by cooperating with Staff in drafting a Supplemental Letter to consumers.

Since the commencement of litigation, PE Services has acted in good faith to clarify any alleged inadequacy in the Offer Letter and Agreement through discussions with the Staff. R. 47-51. Ms. Ito explained that these discussions began after the first status hearing in this matter.[5] R. 51. At the outset of litigation, PE Services drafted a Supplemental Letter for distribution to customers in an effort to clarify any alleged ambiguity in the Offer. R. 50-51; Ex. B of PE Services Ex. 1. The Supplemental Letter sought to address Staff's and CUB's concerns and would allow consumers the opportunity to cancel the agreement without penalty. Ex. B of PE Services Ex. 1 at ¶ 3. PE Services coordinated with Staff on several drafts of the Supplemental Letter in an attempt to identify and clarify any language that Staff deemed inadequate. R. 47-51, 89-91. As a result of PE Services' efforts to cooperate with Staff in these ongoing discussions and at Staff's recommendation that PE Services resolve all issues before it

[5] The first status hearing was on October 6, 2003.

sends the Supplemental Letter, distribution has been delayed. Id.; ICC Staff Ex. 2.0 at p. 4. Any delay, however, has been the result of PE Services' desire to ensure that consumers receive one Supplemental Letter that satisfies Staff's recommendations, rather than a series of letters that might cause confusion. R. 47-51, 78.

IV. The Supplemental Letter provides sufficient detail so that all pricing, terms and conditions are adequately disclosed.

Consistent with the recommendation of the Staff as detailed in Ms. Howard's November 6, 2003 affidavit, the Supplemental Letter explains that the utility pass-through charge varies each month and provides a sample range of the pass-through cost per therm for the month of October 2003. R. 52, 67-70; Ex. A of PE Services Ex. 3. It also reiterates that the offer is for a fixed commodity charge of 62¢ per therm and includes a $2.95 monthly administrative fee. Ex. A of PE Services Ex. 3. Further, the Supplemental Letter provides consumers who have accepted the Offer with an opportunity to cancel the agreement without penalty. Id. Therefore, the Supplemental Letter further contributes to the already adequate disclosure of the elements of the price while also providing consumers who have accepted the service with the opportunity to choose whether to continue with service under the Offer.

Additionally, the Supplemental Letter presents the already adequate disclosures regarding termination of the agreement. The Supplemental Letter indicates that PE Services will mail the consumer a letter detailing the new price and time period that would automatically start at the end of the two-year Offer unless the consumer declines the new offer. Id. It also states that consumers will have the opportunity to terminate service under the agreement sixty days prior to the end of the agreement. Id. Finally,

the Supplemental Letter indicates the existence of the termination charge and the details of its application.

PE Services remains willing to mail the Supplemental Letter if Staff concludes that it or a revised version is adequate.

V. PE Services has complied with the recommendations of Staff so that further Staff monitoring and review of PE Services marketing of the Offer is not warranted under the facts of this case.

In her affidavit on November 6, 2003, Ms. Howard recommended that PE Services' marketing be subject to further review and monitoring by Staff. In response, Ms. Ito explained that PE Services stopped marketing the Offer by mail or telephone. PE Services Ex. 3 at ¶¶ 4, 6. Moreover, she explained PE Services' efforts to remedy any alleged inadequacy by sending a Supplemental Letter. Id. at ¶¶ 2, 4-7. To the extent further discussions are required, PE Services remains willing to engage in those discussions.

For the reasons stated above, the Offer satisfied applicable statutory requirements. However, to address Staff's concerns, PE Services willingly complied with Staff's recommendations to cease certain marketing and has acted in good faith to develop a letter to distribute to consumers providing them with an opportunity to cancel the agreement without penalty. Therefore, PE Services does not require continued monitoring in the present matter.

VI. PE Services is not opposed to working with CSD for future marketing so long as PE Services is not unfairly placed at a competitive disadvantage with respect to other AGS who are not subject to the same requirements.

To the extent Ms. Howard's recommendations apply to any future offer and not just the present Offer at issue, PE Services is not opposed to working with the Commission's Consumer Services Division ("CSD") with respect to written materials that

it sends to customers and scripts that serve as the basis for marketing contacts with future customers. PE Services Ex. 3 at ¶ 7. However, the scope and operation of any proposed further monitoring is unclear, and PE Services is concerned that it may unnecessarily be placed at a competitive disadvantage relative to other AGS. Such ambiguity is troubling to PE Services. The timing for CSD's review and response is not indicated so that supervision may cause delay and hardship to PE Services where other AGS are not subject to the same requirements. Delays in marketing review that apply only to PE Services will allow competitors the opportunity to react to market changes through new offers more quickly than PE Services. A requirement that is applicable to only certain AGS will impair their ability to compete effectively, to the detriment of customers. Moreover, it is unclear what recourse PE Services would have should Staff find the marketing inadequate. If the Commission accepts Ms. Howard's recommendation, PE Services urges the Commission to include in its order specific time limitations and dispute resolution processes to avoid harming PE Services' ability to compete on equal footing with its competitors.

Conclusion

For the foregoing reasons, PE Services respectfully requests that the Commission enter an order in favor of PE Services on all counts.

Respectfully submitted,

Peoples Energy Services Corporation

By: /S/ MARY KLYASHEFF
Mary Klyasheff
One of its attorneys

Thomas R. Mulroy
Mary Klyasheff
McGuireWoods LLP
77 W. Wacker Drive
Suite 4400
Chicago, IL 60601
Tel: (312) 849-8272
Fax: (312) 849-8273

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