

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)

PROPOSED FORM OF ORDER

By the Commission:

I. PROCEDURAL HISTORY

The Citizens Utility Board (“CUB”) filed, on September 30, 2003, a Verified Complaint (the “Complaint”) alleging that Peoples Energy Services Corporation (“PE Services”) marketed an offer (“Offer”) that was misleading in violation of the Alternative Gas Supplier Law and applicable utility tariffs. On October 1, 2003, CUB filed a corrected complaint that CUB stated corrected formatting errors. CUB alleged that the Offer did not adequately disclose the details regarding the price of the Offer and terms and conditions related to termination. CUB further alleged that the use of the Peoples Energy name and logo was, in the context of the Offer, misleading. CUB filed an amended complaint on October 30, 2003 (the “First Amended Complaint”). The First Amended Complaint alleges 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 disclosure.

On October 3, 2003, PE Services filed a motion to dismiss CUB’s Verified Complaint. CUB filed a response on October 9, 2003, and PE Services replied on October 13, 2003. On October 16, 2003, the Administrative Law Judge (“ALJ”) denied PE Services’ motion to dismiss. PE Services answered the Complaint on October 21, 2003, and answered the First Amended Complaint on November 5, 2003.

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 witness Joan S. Howard. Ms. Ito’s affidavits were submitted on October 21, 2003, November 5, 2003, and November 14, 2003, and admitted into evidence. Ms. Howard, a Consumer Policy Analyst in the Commission’s Consumer Services Division, submitted two affidavits on behalf of Commission Staff dated November 6, 2003 and November 19, 2003, and the affidavits were admitted into evidence. CUB submitted no affidavits and did not offer a witness in this proceeding.

No interventions were filed in this proceeding. There was a pre-hearing conference on October 6, 2003, and there were several subsequent status hearings. On November 21, 2003, there was an evidentiary hearing. Entering appearances at the hearing were PE Services, CUB and the Commission Staff. At the hearing, Ms. Ito testified for PE Services and Ms. Howard testified for Staff. Cross-examination of the witnesses was conducted. At the conclusion of the hearing, the record was marked "heard and taken."

PE Services, Staff and CUB filed initial briefs on December 8, 2003 and reply briefs on December 16, 2003. The ALJ issued a Proposed Order on _____. _____ filed briefs on exception to the Proposed Order on _____ and _____ filed briefs in reply to exceptions on _____.

II. OVERVIEW

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 ("Peoples Gas") service territories (Docket No. 02-0506, Order at 1, September 25, 2002). On or about September 8, 2003, and continuing for a period of four to five days, PE Services distributed a one-page offer to 200,000 consumers in the Nicor Gas and North Shore service territories. The Offer was a two-sided document. On the front side was a letter and a tear-off card for customers who wished to accept the Offer in writing (the "Offer Letter"). The Offer Letter provided a general description of the Offer. The back side was a document entitled "Natural Gas Agreement" (the "Agreement"). The Agreement detailed the price, terms and conditions of the Offer. Together, the Offer Letter and the Agreement constitute the Offer.

At the same time, PE Services also marketed the Offer by telephone. The telephone marketing included both inbound and outbound calls. The Offer provided a telephone number by which customers could accept service under the Offer, and PE Services contacted a portion of the customers who had been sent the Offer.

PE Services drafted a supplemental letter ("Supplemental Letter") for distribution to customers in an effort to clarify any alleged ambiguity in the Offer. The Supplemental Letter sought to address Staff's concerns and would allow consumers the opportunity to cancel the agreement without penalty. 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. On December 11, 2003, PE Services mailed the Supplemental Letter to the consumers who accepted the Offer.

III. THE ADEQUACY OF PE SERVICES' DISCLOSURE OF THE PRICE, TERMS AND CONDITIONS OF THE OFFER

Article XVI of the Public Utilities Act (the “Act”) is the Alternative Gas Supplier Law. Section 19-115 of the Act sets forth the obligations of an AGS with respect to marketing. Specifically, Section 19-115(f)(1) provides that:

An alternative gas supplier shall comply with the following requirements with respect to the marketing, offering, and provision of products or services:

(1) Any 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 prices, terms, and conditions” of the Offer.

A. Standard of Review

1. Initial Positions

a. PE Services’ Position

PE Services states that 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).

PE Services states that Section 19-115 does not define the term “adequate.” 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). PE Services states that neither definition provides guidance in the present matter because the statute does not indicate for what purpose the information must be “adequate.” PE Services states that, without a specified purpose or requirement to serve as an objective reference for the application of the adequate disclosure standard, Section 19-115(f) allows for a subjective determination of compliance.

PE Services avers that, 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. 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.

PE Services asserts that an objective standard must be applied. Drawing on the limited guidance available from the Commission, PE Services states that 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).

b. Staff’s Position

Staff did not address the standard of review involved in this matter.

c. CUB’s Position

CUB, citing utility tariff provisions requiring adherence to truth in advertising laws, states that the Commission should look to the Consumer Fraud Act as a guide in determining whether PE Services engaged in any misleading marketing practices. In Docket No. 00-0043, the Commission addressed its authority regarding misleading marketing practices, stating, “facts that would constitute fraud under the Consumer Fraud Act would likely also constitute evidence of unjust and unreasonable conduct under the [Public Utilities] Act.” Citizens Utility Board v. Illinois Bell Telephone Co., Docket No. 00-0043 Final Order at 6 (Jan. 23, 2001). Section 510/2 of the Consumer Fraud Act and Deceptive Business Practices Act states,

A person engages in deceptive trade practices when, in the course of business, vocation or occupation, he: (11) makes false or misleading statements of fact concerning the reasons for, existence of or amounts of price reductions; (12) engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding.

815 ILCS § 510/2(11),(12).

Furthermore, subsection (5) states that “a person engages in a deceptive practice when he “represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have” Id. at (5).

In addition, CUB asserts that the Commission also states that it will look to rulings by the Federal Trade Commission and Federal Communications Commission, to determine whether a marketer is in compliance with the Public Utilities Act. Specifically, the Commission cites the FCC/FTC Policy Statement:

A deceptive ad is one that contains a misrepresentation or omission that is likely to mislead customers acting reasonably under the circumstances about a material fact. Material facts are those that are important to a consumer’s decision to buy or use a product. Information pertaining to the central characteristics of the product or service is presumed material. The cost of a product or service is an example of an attribute presumed material

Illinois Bell Telephone Co., Docket No. 00-0043 Final Order at 12-13.

CUB asserts that the statements in the Offer violate the standards of the Consumer Fraud Act by misrepresenting a material characteristic of the Offer and the quantity of the Offer. Additionally, CUB states that the statements of the Offer Letter are likely to create confusion or misunderstanding as to the terms of the Offer.

2. Responses

a. PE Services’ Position

PE Services states that an appropriate standard for reviewing the allegations in this case is to determine whether the Offer provided sufficient information for a reasonable person to evaluate the service offering. The Consumer Fraud Act, and the contexts in which the Commission has previously relied on analogies to this statute, do not provide a sound basis for evaluating a claim under Section 19-115 of the Act.

First, if CUB is seeking to have the Commission enforce the Consumer Fraud Act, PE Services states that the Commission lacks jurisdiction to hear claims for alleged violations of the Consumer Fraud Act. See Paniotte v. Illinois Bell Telephone Co., Docket No. 01-0393, Order at 4 (September 11, 2002); Citizens Utility Board, Docket No. 00-0043, Order at 6 (January 23, 2001). In the case cited by CUB, the Commission found the Consumer Fraud Act instructive in determining when a public utility engages in unjust, unreasonable and improper practices in violation of Sections 8-501 and 9-250 of the Act. However, the analogy to AGS fails as AGS are not public utilities and those sections of the Act do not apply to AGS. In support, PE Services cites Section 19-115(b)(1) (subjecting AGS only to certain sections of the Act: Sections 8-201 – 8-207, which deal with the termination of winter service, Section 8-301, which deals with units of service, Section 8-505, which deals with operational safety, and Section 8-507, which

deals with accident reports). Because no section of the Act authorizes the Commission to enforce the Consumer Fraud Act in connection with a complaint against an AGS, the Commission lacks such power. Moreover, PE Services states that using the Consumer Fraud Act as a basis for construing Section 19-115 fails because Commission precedent in this regard has focused on a public utility and on sections of the Act that are inapplicable to AGS.

Additionally, PE Services states that the Consumer Fraud Act itself demonstrates that the Commission lacks jurisdiction to consider CUB's Consumer Fraud Act challenge. The Consumer Fraud Act allows suits solely for injunctive relief to be initiated by the Attorney General or the States' Attorneys. 815 ILCS § 505/7. Otherwise, the Consumer Fraud Act only permits actions by "persons who suffer actual damages." 815 ILCS §505/10a. According to PE Services, CUB has suffered no actual damages and instead raises an injunction-only proceeding in contradiction to the Consumer Fraud Act.

PE Services then states that, assuming, *arguendo*, that the Consumer Fraud Act does apply or can serve as a standard for reviewing a claim under Section 19-115 of the Act, the Offer did not violate that statute. The Agreement, which appeared on the back side of the Offer Letter and was an integral part of PE Services' marketing effort, clearly described the terms and conditions of the contract. PE Services explained that all customers, whether they enrolled by mail or by telephone, received at least one copy of the Agreement.

The terms and conditions of the agreement were provided to consumers at the same time as the Offer Letter as a single marketing effort. Because PE Services provided consumers with the challenged provisions at the same time as the Offer Letter, PE Services states that the allegedly misleading statements do not violate the Consumer Fraud Act. See *Moisman v. BMW Financial Services, Inc.* ("Moisman"), 321 Ill. App. 3d 386, 391 (3d Dist. 2001) (affirming Circuit Court's grant of motion to dismiss Consumer Fraud Act claim after noting that "had [the plaintiff] taken greater care in reviewing the lease prior to signing it, he would have been alerted to the presence of the use tax"); *Krause v. GE Capital Mortgage Services, Inc.*, 314 Ill. App. 3d 376, 389 (1st Dist. 2000) (finding no violation of the Consumer Fraud Act for purchases of vehicles after issuance of press releases detailing problems with the vehicles); *Saunders v. Michigan Avenue National Bank* ("Saunders"), 278 Ill. App. 3d 307, 312 (1st Dist. 1996) (affirming the Circuit Court's granting of motion to dismiss the Consumer Fraud Act claim over objection that information about an overdraft charge "was buried in several documents" because bank had provided pamphlets containing overdraft provision); *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 23 (2d Dist. 1995) (affirming Circuit Court's grant of motion to dismiss Consumer Fraud Act claim after noting that defendants set forth in "great detail" the nature and risks of investing in real estate partnerships).

According to PE Services, CUB ignores recent case law and fails to allege that any consumer who accepted the offer did not receive the gas at the advertised price of 62¢ per therm. Similar to *Moisman*, PE Services states that its Offer disclosed the

challenged material in a later part, the Agreement, which appeared on the backside of the same piece of paper as the letter. Additionally, in Saunders, the court affirmed the dismissal of a Consumer Fraud Act claim despite arguments that information concerning an overdraft charge, “was buried in several documents” because the bank had provided pamphlets containing the challenged provision. Saunders, 278 Ill. App. 3d 307, 312 (1st Dist. 1996).

Finally, PE Services argues that CUB’s reliance on language in the Commission’s order in Nicor Gas’ Customer Select case as support for the use of the Consumer Fraud Act is misplaced.

b. Staff’s Position

Staff states that the statutory requirement is straightforward. Staff states the Commission should reject PE Services’ creative interpretation of the requirement.

c. CUB’s Position

CUB argues that the Commission has previously found the Consumer Fraud Act to be instructive and should again look to the standards in the Consumer Fraud Act for guidance. The Illinois Supreme Court has stated, “A material fact exists where a buyer would have acted differently knowing the information, or if it concerned the type of information upon which a buyer would be expected to rely in making a decision whether to purchase.” Connick v. Suzuki Motors Co., 174 Ill.2d 482, 504; 675 N.E.2d 584 (1996); See also, Stouffer Foods Corp. v. Fed. Trade Comm’n, 118 F.T.C. 746; 1994 FTC Lexis 196, 11 (1994). Thus, any information that consumers would have likely relied upon in reaching their decision should be considered material. CUB states that the Federal Trade Commission warns marketers not to mislead consumers by burying important details in fine print.

CUB cites an Illinois appellate court decision stating that: “Where the dominant theme of the insurer’s advertising materials is comprehensive coverage, the insertion of a relatively inconspicuous caveat that coverage is subject to the policy terms should not be found sufficient to overcome the overall impression created by the brochure.” Dobosz v. State Farm Fire & Casualty Co., 120 Ill. App. 3d 674, 682 (2nd Dist. 1983). CUB cites Siegel v. Levy Organizational Development Co., 153 Ill. 2d 534, 545 (1992) for a similar proposition. CUB contends that Siegel is particularly applicable to the case at hand because many of the details in the PE Services’ contract that represent material changes from the letter would be discernible only to someone with extensive knowledge of gas issues. CUB argues that, as the Illinois Supreme Court has ruled regarding consumer fraud, the Commission must determine what is misleading and what constitutes adequate disclosure on a case-by-case basis. Laughlin v. Evanston Hospital, 133 Ill. 2d 374 (1990).

According to CUB, PE Services’ claim that the statute is “impermissibly vague,” contradicts the Illinois Supreme Court’s finding in Evanston Hospital. Moreover, it

ignores the FTC guide produced specifically for gas and electric marketers. Failure to properly disclose the administrative fee of \$2.95 per month has the same effect on customers as failing to disclose a sign up charge in the FTC example.

When enforcing the Consumer Fraud Act, courts have not only reviewed the specific elements of an offer, they have looked at the offer as a whole and applied a net impression test. Williams v. Bruno Appliance and Furniture Mart, 62 Ill. App. 3d 219, 222 (1st Dist. 1978).

According to CUB, the Commission specifically addressed this concern when it approved the expansion of Nicor Gas' Customer Select program. The Commission expressly ordered Nicor Gas to assert a Rider in its tariff requiring that it "adhere to any applicable truth in advertising laws." According to CUB, such truth in advertising laws would ostensibly include the Consumer Fraud Act. The Commission stated that, "It is important for customers, particularly less sophisticated customers to have the ability to easily evaluate service offers from alternative suppliers." Order Docket Nos. 00-0620 and 00-0621 at 65 (July 5, 2001). This language is consistent with the legislative intent to protect consumers from unfair or deceptive business practices.

3. Commission Discussion

First, CUB, as the complainant, has the burden of proof in this proceeding.

Second, this proceeding is one of first impression and raises an interesting question as to how the Commission should evaluate whether an AGS has adequately disclosed the price, terms and conditions of an offer in a marketing effort. Section 19-115 of the Act sets forth the obligations of an AGS with respect to marketing and states, in pertinent part, that:

An alternative gas supplier shall comply with the following requirements with respect to the marketing, offering, and provision of products or services:

(1) Any 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).

PE Services contends that the statute fails to provide an objective reference for the determination of whether disclosures are adequate. In the absence of such an objective reference, PE Services states that Section 19-115(f) relies on subjective opinions and is impermissibly vague. Although, on its face, Section 19-115(f) does not contain an objective guide for the meaning of the phrase "adequately discloses", the Commission is disinclined to find that the statute is impermissibly vague and that its application is a violation of due process. This is not to say, however, that we disagree with PE Services' contention that the application of Section 19-115(f) must be guided by

an objective standard. Indeed, an objective standard is necessary both to allow AGS to create marketing that complies with the law, and to ensure that the law is applied in a consistent and just manner.

It is unnecessary to find the provision in question impermissibly vague or extend our analysis beyond the scope of the Act, as CUB contends that the Commission should. Rather, an objective basis for the requirement of adequate disclosure can be found in the purpose of the statute as articulated in the Nicor Gas Customer Select Order, Docket Nos. 00-0620 and 00-0621 Cons. at 65 (July 5, 2001). As CUB notes, in the Nicor Gas Customer Select Order, the Commission explained that “it is important for customers, particularly less sophisticated customers, to have the ability to easily evaluate service offers from alternative suppliers.” It is this statement of purpose that serves as the objective basis for the adequate disclosure standard in Section 19-115(f). Marketing disclosures must be adequate so as to allow a reasonable consumer to evaluate the price, terms, and conditions of the service offer.

CUB urges the Commission to look to the Consumer Fraud Act or the Federal Trade Commission for guidance as to what constitutes misleading marketing. CUB contends that the Commission has found guidance in the Consumer Fraud Act before in other contexts and should do so again in the present matter. However, we are not convinced. With an objective standard in place by which to judge the disclosures of an AGS, the Commission sees no need to look beyond the Act for guidance in evaluating PE Services’ marketing disclosures. Unlike the other occasions when the Commission found the Consumer Fraud Act instructive, the present matter involves an AGS and not a public utility. Moreover, the sections of the Act that were under review in the case cited by CUB are sections that are inapplicable to AGS.

Section 19-115(f) of the Act provides the requirements for the disclosures of AGS who engage in marketing. Section 19-115(f) can be construed to provide an objective standard by which to evaluate the required disclosures so that there is no need to look beyond the Act. Thus, the Commission rejects CUB’s contention that the Consumer Fraud Act should apply as guidance in this matter. Instead, the marketing will be evaluated objectively to determine whether PE Services’ Offer provided sufficient information for a reasonable person to evaluate the service offering.

B. The Offer

1. PE Services’ Position

PE Services states that together, the Offer Letter and Agreement, which are in the form of a one-page document, constitute the Offer and fully describe the price, terms and conditions of the Offer. The Offer Letter provides a brief description of the Offer and the Agreement provides the complete terms and conditions. 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 Agreement.” 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. 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. The Offer included both the Offer Letter and the Agreement as a single marketing effort.

2. Staff's Position

Staff states that the Offer Letter should be viewed separately from the Agreement because, according to Staff witness Howard, it is the marketing materials that attract customers, not the fine print of a contract or agreement. Staff states that including the Agreement with the marketing letter does not relieve PE Services of its responsibility to disclose all prices, terms and conditions in the marketing letter. Staff further states that the details of a marketing letter must be fully consistent with the terms of the contract. Where a marketing letter or summary contains inconsistent costs or provisions, the marketing letter or summary may cause customer confusion. Confusing marketing reduces the ability of consumers to make informed choices and increases customer dissatisfaction that, in turn, undermines consumer confidence.

3. CUB's Position

CUB states that the Commission should evaluate the various elements of the Offer individually in addition to examining the general impression of the whole. CUB states that the characterization of the letter and agreement as one marketing piece distorts the effect of the solicitation. CUB states that the Offer Letter fails to meet the requirements of Section 19-115(f) because the Offer Letter did not disclose the price, terms, and conditions of the Offer. When viewed alone, the Offer Letter provides insufficient disclosure because it states that the Offer is for a fixed price of 62¢ per therm while the details of the Agreement provide further details that raise the price beyond 62¢ per therm.

4. Commission Discussion

As an initial matter, the Commission notes that neither Staff nor CUB presented any evidence of actual customer confusion or complaints regarding the form or content of the Offer. CUB correctly points out that marketing should be evaluated as a whole in order to determine its impact. CUB and Staff are correct that the Offer Letter and the Agreement must be consistent. The offer at issue consists of both the marketing letter and the contract. PE Services' Offer consisted of a single piece of paper with the Offer Letter on the front side, and the Agreement on the back side. In order to accept service under the agreement, customers were required to sign a statement indicating that they had read and agreed to the terms of the Agreement. Moreover, those customers who accepted service under the agreement in writing or by telephone were provided with a copy of the Agreement and had the opportunity to rescind the agreement without penalty.

Although both Staff and CUB contend that the Offer Letter must be viewed separately from the Agreement, the Commission believes this approach could impair the ability of AGS to market to consumers in a clear and efficient manner. Staff's contention that the marketing letter should contain all pricing, terms and conditions of service would essentially require that AGS include full contracts on the face of each marketing document. Such a requirement would result in the very confusion that Staff seeks to avoid. Thus, we find that it is possible for "marketing materials" to consist of more than one page without including complete details of the pricing, terms, and conditions on each page. In this case, customers received a single piece of paper with the terms and conditions of the Offer.

For purposes of our analysis of the Complaint, including allegations about discrete components of the Offer, we will therefore consider both the Offer Letter and the Agreement as a whole when evaluating the adequacy of the disclosures in the Offer. Moreover, our analysis in this Order will be cognizant of the fact that there is no evidence of any customer complaints about the Offer.

B. The Limited Size of the Offer

1. Initial Positions

a. PE Services' Position

PE Services states that the Offer was initially limited to 2,000 customers because it had only secured supply sufficient to serve that number of customers. Subsequent to the mailing of the Offer, PE Services was able to secure an additional supply which would allow it to serve additional customers at the offered price of 62¢ per therm for a two-year period.

b. Staff's Position

Staff states that the Offer Letter expressly provides that the Offer is only good to the first 2,000 customers. Staff notes that this language appears partially in bold typeface and indicates that the Offer presents an opportunity for customers to avoid paying higher prices during the winter. Staff argues that the Offer must be viewed as a whole and the impact of this language should be taken into account.

c. CUB's Position

CUB states that the language of the Offer limiting it to 2,000 customers is misleading. The Offer Letter states in bold type "Protect Yourself Against Rising Gas Costs – Fix The Price Now Before Winter!" CUB states that PE Services then emphasizes in bold print that, "This offer is only good to the first 2,000 customers." CUB argues that PE Services' statements are an attempt to frighten customers into accepting the Offer quickly without properly considering the Offer. According to CUB,

on September 20, 2003, the Chicago Tribune published an article in which Peoples' spokeswoman Elizabeth Castro indicated that the Offer might be made available to additional customers. The initial warning regarding the size limitation of the Offer was, therefore, misleading.

2. Responses

a. PE Services' Position

PE Services states that the Offer was initially limited in size because 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 states that it 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 argues that, 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 ten 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. PE Services contends that it is easily understandable why it could have found itself with sufficient supply to extend the offer to serve more customers. Moreover, PE Services states that 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. Also, Ms. Ito explained that PE Services, in the case of other offers, has had to reject customers because of supply limitations. PE Services argues that the adequate disclosure requirement cannot be so rigid as to require PE Services to 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.

b. Staff's Position

Staff reiterates its earlier assertion that the Offer Letter expressly provides that the Offer is only good to the first 2,000 customers. This language appears partially in bold typeface and indicates that the Offer presents an opportunity for customers to avoid paying higher prices during the winter.

c. CUB's Position

CUB argues that the language limiting the size of the Offer must be considered in the context of other statements in the letter warning customers of high prices and the

need to protect themselves. The Offer implies that those customers who want to take the time to consider the Offer against other potential agreements risk losing out, and therefore the limitation could have the affect of intimidating customers into accepting the Offer immediately.

CUB states that PE Services, in its Motion to Dismiss, confirmed earlier statements made by a spokeswoman that the offer was not limited to the first 2,000 customers. PE Services created a false impression that consumers had to act immediately or lose the opportunity to protect themselves against high gas prices.

3. Commission Discussion

PE Services' indication that the Offer was limited in size does not violate the requirements of Section 19-115(f), even where PE Services later expanded the amount of customers it was willing to accept under the Offer.

Nothing in the Act prevents an AGS from imposing a limitation on its Offer by specifying a number of customers that it would accept under the terms of the Offer. PE Services offered valid reasons for why a limitation may be necessary and appropriate.

CUB and Staff contend that the subsequent expansion of the Offer serves as an indication that the initial limitation was a fraudulent ploy to frighten consumers into accepting service without first comparing other potential offers. However, this argument is to no avail. The fact that PE Services was subsequently able to secure additional gas at a cost sufficient to allow for expansion of the Offer does not affect the legitimacy of the original limitation. Neither CUB nor Staff contested PE Services' explanation why a limitation may be appropriate or how PE Services was able to extend the offer to additional customers. Under CUB's and Staff's logic, an AGS would never be able to alter or expand a limited offer, even where subsequent expansion might allow additional consumers to take part in a beneficial offer. Such logic ignores the nature of the gas market which, as PE Services correctly notes, is unlike a typical market. The amount of gas that a consumer requires varies so that it is difficult for an AGS to exactly predict how many consumers they can serve with a set amount of gas under an offer. An AGS should not be subjected to allegations of fraud or misconduct because they were able to secure additional supplies of gas after first having marketed a limited size offer. However, the Commission suggests that, in future offerings, PE Services consider describing any limitations less precisely to avoid the questions raised in this proceeding. CUB's and Staff's claims are rejected.

C. The Offer Price

1. Initial Positions

a. PE Services' Position

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

b. Staff's Position

Staff states that the Offer price is not adequately disclosed in the Offer Letter. Staff states that a distinction should be drawn between the Offer Letter and the Agreement as it is the Offer Letter, and not the terms and conditions contained in the Agreement, that attracts consumers to accept the Offer. Staff contends that the Offer Letter and the Agreement are inconsistent in their pricing terms. The Offer Letter promises a fixed price at 62¢ per therm until September 2005 while the Agreement incorporates unspecified additional charges. While the administrative fee is listed as a set price, the exact nature and impact of the pass-through charges is unclear. Staff argues that it is clear that the Offer price will exceed the promised 62¢ per therm.

c. CUB's Position

CUB states that the price is not adequately disclosed in the Offer Letter. CUB makes a distinction between the Offer Letter and the Agreement. CUB states that the Offer Letter, on its face, is insufficient because it states that the offer is for a fixed price of 62¢ per therm while additional charges appear in the fine print as part of the Agreement. Therefore, customers are misled to believe that the Offer will lock them into a fixed price of 62¢ per therm until September 2005. In reality, CUB states that customers may face hidden costs such as the monthly administrative fee that raise the actual payments customers make under the Offer. This prevents customers from making an informed decision when comparing agreements. Moreover, although the additional costs may appear in the Agreement, their impact is not disclosed.

2. Responses

a. PE Services' Position

PE Services states that on December 11, 2003, it distributed a Supplemental Letter to consumers that highlights the pricing terms and provide consumers with the opportunity to cancel the agreement without penalty. Thus, in addition to the adequate disclosure in the Offer, consumers were further informed of the three price components and their impact.

1) The pass through cost

As an initial matter, PE Services notes that neither CUB nor Staff have presented evidence that a single consumer complained about the Offer or expressed confusion as to the pricing terms. CUB's and Staff's arguments are not grounded in evidence of confusion. According to PE Services, the existence of a pass-through cost is clearly indicated in the Agreement. PE Services witness Ito testified that PE Services did not list a specific amount for the pass-through cost because it varies from month to month. Also, the names of the charges differ in Nicor Gas and North Shore territories. Listing specific charges in the Offer Letter or Agreement would cause confusion. The various charges that comprise the pass-through charge are complex and are based upon determinations beyond the control of PE Services because they are determined from time to time during the year by the utilities.

PE Services questioned the relevance of Staff's suggestion that it is important to distinguish between utility charges to the customer and utility charges to the supplier. PE Services states that the charges in question are indisputably utility charges, and the Offer accurately describes them as such. PE Services states that it disclosed the existence of the pass-through charge and adequately disclosed the nature of these costs in a manner designed to avoid confusion. PE Services contends that 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.

2) The monthly administrative cost

PE Services questions CUB's calculation of the monthly administrative fee as a per therm charge. The monthly administrative fee is not a per therm charge. PE Services states that it would be illogical to attempt to detail the impact of the \$2.95 monthly administrative fee on a consumer's monthly bill when the relative impact clearly would depend on the amount of gas consumed by the consumer and the per therm rate charged by the unknown other provider to which CUB refers. The existence of the \$2.95 monthly administrative charge is clearly disclosed on the Agreement. According to PE Services, any attempt to provide a description of the potential impact on a consumer's bill would only create confusion due to the impossibility to predict the relative impact.

b. Staff's Position

Staff states that the price of the Offer is not clear from the face of the Offer Letter and that PE Services' efforts to clarify the price in drafts of the Supplemental Letter have been insufficient because the details of the pass-through cost remain inadequately disclosed. Staff states that the price must be fully disclosed in the Offer and that any per therm charge passed on to the customer must be completely disclosed in any marketing material. Staff contends that the Offer Letter did not sufficiently disclose the price and it is unclear what price a customer might pay under the Offer. Staff states that

the words “commodity price” never appear in the marketing letter or agreement and, notably, not in the prominent reference in the letter to a 62 cents per therm price.

Staff takes particular issue with the pass-through costs. Staff witness Howard stated that she was unable to discern whether the charges were utility charges to the customer or to the supplier. Moreover, Staff states that the costs are not set, so customers have no idea what they may be charged. While PE Services proposed to provide an estimated range of the pass-through charges for the month of October, Staff was troubled by the range of the estimate and potential that it may vary from month to month.

c. CUB’s Position

CUB states that the costs associated with the Offer are not adequately disclosed to consumers. CUB states that the Offer should be viewed in its entirety and that the language of the Offer should be taken into account as well as the inadequate pricing disclosures. Customers are unable to discern the true cost of the Offer because the components of the price are not clearly listed as part of the Offer Letter. Instead, the Offer Letter urges customers to lock in a fixed price of 62¢ per therm.

CUB states that \$2.95 monthly administrative fee is not clearly disclosed in the Offer Letter. CUB states that it is the Offer Letter, and not the terms of the Agreement that attract consumers. As such, the monthly administrative fee is not adequately revealed. Moreover, even though the monthly administrative fee is revealed in the Agreement, the impact is not clearly revealed. To illustrate its position, CUB translates the fixed monthly administrative charge into a per therm charge and adds it to the 62¢ commodity charge. CUB further argues that the monthly administrative fee might cause a consumer’s bill to be higher under the offer than if that consumer remained with a regulated service.

Regarding the idea of a Supplemental Letter, CUB states that it appreciates clarification, but after the fact explanations do not absolve PE Services from a contract that violates the Act.

3. Commission Discussion

Staff and CUB contend that the price of the Offer is not adequately disclosed in the Offer Letter, that the price on the Offer Letter is inconsistent with the pricing terms of the Agreement, and that impact of the charges of the Offer is not adequately disclosed even if the existence of the charges themselves are. For the reasons set forth below, the Commission rejects Staff’s and CUB’s arguments.

The Commission has already determined that Staff’s and CUB’s interpretation of the Offer as two separate parts is inconsistent with the facts of the case and the nature of marketing. The Offer must be viewed as a whole and not as individual parts. As such, the three components of the price are provided in the Offer as part of the

Agreement in a paragraph entitled “Price.” The title of the paragraph is in bold font and is underlined. Paragraph 4 lists each of the three elements of the Offer price: the 62¢ per therm fixed commodity price, the \$2.95 monthly administrative fee, and utility charges assessed on a pass-through basis. CUB’s and Staff’s contention that the elements of the Offer price were not adequately disclosed under the requirements of Section 19-115(f) thus fails.

Similarly, CUB’s and Staff’s contention that the impact of the charge requires greater attention is without merit under the requirements of Section 19-115(f). Section 19-115(f) requires that the where marketing material contains the price of an offer, the price must be adequately disclosed. Section 19-115(f) does not require PE Services to provide an analysis of the potential impact of the Offer price and how it may compare to other offers. The existence of the costs was disclosed by the Offer so that PE Services has complied with the requirements of Section 19-115(f).

A particular point of contention in this matter is the uncertain nature of the pass-through cost. Staff expressed concern that the various elements of the pass-through cost were not specifically discussed in the Offer and that PE Services could not provide a set price for consumers to consider when weighing the Offer. The various charges that compose the elements of the pass-through charge are complicated and would be difficult for the average customer to understand. During testimony, PE Services’ expert, Ms. Ito, explained each of the component charges. Ms. Ito’s testimony revealed that PE Services is unable to provide customers with an exact figure for these charges because they are beyond the control of PE Services and vary more than once per year. The addition of a lengthy explanation of each component charge, its estimated range for any particular month, and its potential impact on a consumer’s bill relative to service by another provider would be speculative and needlessly complicate the terms of the Offer rather than provide clarity. Therefore, under Section 19-115(f), PE Services’ disclosure was adequate.

B. Payment provisions

1. Initial Positions

a. PE Services’ Position

PE Services states that Paragraph 5 of the Agreement, a paragraph entitled “Payment” clearly states that “payment is due 10 days after the invoice date.” Therefore, the payment provisions are adequately disclosed. PE Services further states that CUB’s contention that the time for payment is too short is not relevant. Also, PE Services states that it uses the utility single bill option and waives this provision so that bills are due on the utility due date.

b. Staff’s Position

Staff does not address the timing of payment, but instead states that the Offer is inadequate because it refers to payment options, but fails to disclose the details of the options. Staff opines that the availability of payment options may tend to attract consumers. It is therefore important that the Offer disclose the details of any available payment options so that consumers may make an informed decision regarding service under the Offer.

c. CUB's Position

CUB states that the Agreement does not adequately disclose the payment requirements of the Offer. Specifically, CUB argues that the timing of required payments is too short. CUB states that under the terms of the Agreement, PE Services can require payment ten days after the invoice date. The ten-day payment period is much shorter than the twenty-one day period for payment to utilities imposed by Commission regulations.

2. Responses

a. PE Services' Position

PE Services states that payment options are not terms or conditions of the contract. Instead, they are options that provide the customer flexibility. No individual payment option is a specific term or condition of the agreement so that there is no need for the options to be disclosed in the terms and conditions. The existence of the options is adequately disclosed. Section 19-115(f) does not require that the optional arrangements that a customer may select be adequately disclosed.

Additionally, PE Services states that CUB's contention that the payment period is too short is not relevant. PE Services states that the issue in this case is adequacy of disclosure.

b. Staff's Position

Staff contends that PE Services maintains the ability to discontinue the single bill option under the terms of the Agreement so that the ten-day payment requirement may still be brought into application. Moreover, customers are attracted by the prospect of payment options so that such options should be fully disclosed in the terms and conditions of the Offer.

c. CUB's Position

CUB states that the Offer fails to inform consumers that the payment requirements differ from those of regulated utilities such as Nicor Gas and North Shore. Although PE Services has indicated that it intends to use Nicor Gas and North Shore for single billing, it is not required to do so. Therefore, PE Services may impose the ten-day payment requirement rather than the requirement imposed on regulated utilities.

Section 280.90(c) provides that payment to a utility is not due for at least twenty-one days after the date of the postmark on the bill. CUB states that the ten-day period that potentially may be imposed by PE Services is much shorter than the Commission requirement for utilities.

3. Commission Discussion

The payment provisions of the agreement were adequately disclosed in the Offer. We first address Staff's contention that payment options are a term or condition of the contract that must be adequately disclosed. The Offer Letter states that "[w]ith Peoples Energy Services, you will enjoy a single monthly bill and many payment options." Staff states that the offer of payment options is a factor that may attract consumer so that the Agreement should adequately disclose details regarding the options. Payment options are not, however, terms or conditions of service. The Agreement does not require the customer to make payments using any specific method. Instead, as the name implies, they are optional provisions that provide consumers with flexibility. A consumer is not required to select a payment option as a condition for accepting service under the agreement. Rather, a consumer may inquire as to what options might be available and how those options operate. Therefore, under Section 19-115(f), PE Services is not required to disclose the details of optional contract provisions.

Next, we address CUB's contentions regarding the timing of payment under the Offer. CUB is correct that utilities must allow residential customers twenty-one days for bill payment. CUB and Staff are also correct that, if PE Services were to abandon the single bill option, consumers would potentially face the ten-day payment period provided in the Agreement. Regardless of whether PE Services elects to continue using the single bill option, PE Services is not a utility and so is not bound by the billing timeline provided in Section 280.90. It is therefore lawful for PE Services to impose a shorter payment date than the twenty-one days specified in Section 280.90. More importantly, the present matter concerns whether the pricing, terms, and conditions of the Offer were adequately disclosed under Section 19-115(f). The payment provisions clearly appear in Paragraph 5 of the Agreement, a paragraph entitled "Payment." The ten-day payment period appears at the beginning of that paragraph and is adequately disclosed to a reasonable consumer considering service under the agreement. Therefore, Staff's and CUB's claims regarding inadequate disclosure of the payment period fail.

C. Termination Provisions

1. Initial Positions

a. PE Services' Position

Paragraph 7 of the Agreement provides consumers with the opportunity to discontinue service sixty days before the end of the agreement at the end of which time, if the consumer elects not to terminate service, the Offer continues rather than

automatically expiring. PE Services states that the Agreement clearly indicates that while consumers may receive a price notice for subsequent service to begin at the end of the two-year term, the consumers have the opportunity to reject the price notice. This in no way affects continued service under the Offer for the two-year agreement.

PE Services states that CUB mischaracterizes the effect of Paragraph 7 and the specific language that it excerpts for its complaint. That provision 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.” According to PE Services, 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.

The termination charges are specifically described in Paragraph 7 of the Offer which is entitled “Term, Termination & Termination Charges.” Contrary to CUB’s argument, PE Services states that the existence of a termination fee is not hidden. The title of Paragraph 7, which is in bold type, clearly indicates that the Offer contemplates a termination charge, which is discussed in Paragraph 7. Moreover, PE Services argues that Paragraph 7 provides adequate detail regarding the termination fee. The termination fee is not hidden and is clear.

b. Staff’s Position

Staff states that Paragraph 7 of the Agreement does not adequately disclose the terms regarding the termination of the Offer. Staff states that the Offer may extend beyond the two-year term and that PE Services may submit a new price during the two-year agreement. Staff also contends that the Agreement contains an early termination provision that is not adequately disclosed in the Offer Letter. Customers who accept the Offer are locked in for a period of at least two years while PE Services retains flexibility to break the agreement. Staff states that PE Services must disclose the fact that there is a price to terminate the agreement. Customers must receive this information in order to make an educated determination of whether to accept service under the Offer. As such, Staff believes that the existence of a termination cost must appear on the Offer Letter and not in the Agreement.

Moreover, the termination fee may be significant and the details PE Services provided regarding the calculation of the fee are insufficient for a consumer to determine what the termination cost might be. The Termination provision relies on PE Services’ good faith estimate as to the number of therms of gas that would have been used during the remainder of the agreement. Staff states that the amount could be substantial.

c. CUB’s Position

CUB states that customers are misled to believe that the Offer will continue until September 2005 while PE Services has the right to terminate the Offer based on its sole judgment upon any circumstances. CUB states that PE Services reserves the right to

terminate the agreement for any reason at any point during the two-year term while customers are locked into the agreement.

CUB further states that the Offer does not adequately disclose the termination charges that apply should a consumer elect to cancel the agreement. 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.

2. Responses

a. PE Services' Position

Contrary to CUB's assertions, Paragraph 7 clearly states that service will continue unless either party exercises their right to give written notice of termination of the agreement. Moreover, PE Services states that Paragraph 7 clearly provides that where PE Services proposes changes to the price, the consumer may submit a written objection to the offer so that it will not automatically take effect. Finally, PE Services states that, contrary to CUB's assertion that PE Services may change the price from 62¢ per therm at any time, consumers taking service under the Offer will not receive any pricing notices proposing a price increase set to occur during the two-year term of the agreement.

According to PE Services, the language of Paragraph 7 clearly indicates that where a customer terminates the agreement prior to the end of the term, a termination fee of \$0.15 per therm that would have been used during the remainder of the agreement will be assessed, and that PE Services will make a good faith estimate as to the number of therms of gas that would have been consumed. The termination fee is not hidden and is clear.

b. Staff's Position

Staff maintains that the details of the termination fee were not adequately disclosed in the Offer Letter so that the disclosure was inadequate. According to Staff, consumers are attracted by the marketing letter and not by the terms and conditions of the Offer as contained in the Agreement. Consumers evaluate the Offer based upon the representation that the Offer is for a fixed price of 62¢ per therm for a period of two years. The Offer Letter fails to mention the termination cost so that consumers are unaware of a price for early withdrawal from the agreement. Therefore, Staff states that consumers cannot make an informed decision regarding the Offer. Moreover, even though the Agreement discloses the calculation of the termination fee, Staff believes that no consumer would be able to accurately predict how much they might owe because the calculation relies on PE Services' good faith estimate of the number of therms that would have been used by the consumer during the remaining term of the agreement.

c. CUB's Position

CUB states that the Offer incorporates a termination penalty that consumers would not readily discover or understand. The termination penalty does not appear on the face of the Offer Letter and instead is contained in a dense provision in the Agreement. CUB contends that while PE Services can terminate the agreement under virtually any circumstances it chooses, customers must pay a steep penalty if they wish to cancel the agreement. The termination penalty is not adequately disclosed to the consumers. Moreover, it is unlikely that they will see the provision or understand the calculation involved. The Agreement states that a customer will pay PE Services an amount equal to “\$.15 per therm multiplied by the number of therms of natural gas a Client would have used during the remaining term of the Agreement.” The Agreement states that PE Services will make a good faith estimate to determine the number of therms that would have been used during the remaining term of the agreement.

Additionally, CUB states that the Offer Letter does not advise consumers that the agreement may extend beyond the two-year period. The Agreement states that “This agreement will extend automatically form year-to-year after the initial term unless canceled by either party on 60 days written notice prior to the end of the initial term or prior to any extension.”

Finally, CUB argues that PE Services maintains a right to return a consumer to her utility or alter the price of the agreement in contradiction to the 62¢ per therm agreement presented in the Offer.

3. Commission Discussion

Section 9-115(f) deals with adequate disclosure. We find that the Agreement adequately disclosed the details of the termination provision.

Both Staff and CUB contend that the Offer contains a termination fee that is not disclosed in the Offer Letter. However, the disclosures contained in the Agreement must also be taken into account. Paragraph 7 of the Agreement, a paragraph entitled “**Term, Termination, and Termination Charges**” (emphasis in original) discloses the existence of a termination charge and explains the application of that charge. Thus, the Offer discloses the existence and application of the termination charge. Both CUB and Staff take issue with the manner in which the charge is calculated and PE Services’ failure to provide an exact termination charge for consumers to consider when weighing the Offer. They contend that without a calculation that is definite, the disclosure is inadequate because consumers are unable to evaluate the Offer.

Paragraph 7 of the Agreement provides that if the Client terminates the agreement prior to the end of the term,

Company will charge Client, as a termination fee and not as a penalty, an amount equal to \$.15 per therm multiplied by number of therms of natural gas Client would have used during the remaining term of the Agreement.

The calculation of natural gas that Client would have used will be based on Company's good faith estimate.

CUB and Staff express concern that PE Services reserves the right to calculate the number of therms that would have been consumed during the remainder of the term and that consumers are not able to calculate this number and cost. Companies, such as PE Services, have the right to plan ahead in order to compensate for early departure under the agreement. In the present matter, the Offer concerns a fixed price offer for 62¢ per therm. It is therefore logical that any termination charge would also involve a per therm calculation. It would be impractical for PE Services to attempt to estimate the amount of therms involved in this calculation when such a figure would clearly vary by consumer and the number of months remaining under the agreement. The Agreement provides consumers with the basis for calculating the charge so that consumer may, if they wish, estimate this number by referring to prior bills for the number of therms that they have historically consumed. While this calculation may not be entirely accurate, it would provide consumers with the ability to estimate potential costs, which Staff suggests may be an issue to some consumers when weighing the Offer. It also provides customers a means to challenge any calculation that PE Services may make. The existence and formula for the calculation of the termination fee were adequately disclosed for a reasonable consumer to evaluate service under the Offer.

Next, Staff and CUB contend that the Offer does not actually terminate in September 2005. This argument is without merit. The plain words of the agreement show that either party can cancel the agreement at the end of the initial two-year term. Not only is the termination right clearly and adequately disclosed, but CUB's characterization of the provision is incorrect. The provision regarding the extension of service only applies where neither the consumer nor PE Services elects to terminate the agreement. Automatic rollover or evergreen provisions are not an unusual feature of contracts. The termination provision is adequately disclosed in the Offer so that Staff and CUB's claims are rejected.

Finally, Staff and CUB contend that the termination provision of Paragraph 7 provides PE Services with the ability to change the price of the Offer at any time during the course of the agreement. Staff states that the Offer allows PE Services to submit a new pricing offer for a variable price set by Paragraph 3 of the Agreement. Staff and CUB misconstrue the plain words of the Agreement. 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 by giving notice before the end of the term and the customer has a contractual right to object to and reject any pricing offer.

D. Index Price

1. Initial Positions

a. PE Services' Position

PE Services states that the Agreement provides that a customer may only be moved to an index price at the end of the term of the agreement or at the end of subsequent pricing notices. The consumer has the opportunity to cancel service at the end of the agreement term or any extension so that the index price will not apply unless the customer wishes to continue receiving service. PE Services states that the index price was adequately disclosed to consumers in Paragraph 3 of the Agreement as was the consumer's right to reject service from PE Services at an index price.

PE Services states that Paragraph 3 of the Agreement clearly defines the index price as "Natural Gas Intelligence, Weekly Gas Price Index, first of the month issue, Midwest Chicago citygate posting, converted to a price per therm or any successor index ("Index Price") + \$.07 per therm." PE Services states that the index price is thus adequately disclosed to consumers. It is not possible to provide a specific price because the price would vary from month to month.

b. Staff's Position

Staff states that the Offer allows PE Services to modify the price of the Offer during the course of what was represented to be a fixed price agreement. Staff argues that the Offer is not a fixed price offer, but instead it involves a variable price. Paragraph 7 of the Agreement provides that, from time to time, PE Services may submit a new pricing offer as described under Section 3. The reference in Paragraph 7 relates to the index price outlined in Paragraph 3 of the Agreement. While the Offer Letter markets the Offer by urging consumers to protect themselves from high prices by locking in a fixed price, Staff contends that the index price allows PE Services to vary the price in contradiction to the offer for fixed price service for a term of two years.

c. CUB's Position

Similarly, CUB states that PE Services may change the price from the 62¢ per therm to the index price at any time. The index price is just one of the options that PE Services reserves to switch the consumer off of the fixed price offer. The index price is inconsistent with the agreement for fixed price service until September 2005. Moreover, CUB states that the calculation and application of the index price are not adequately explained for a consumer to understand.

2. Responses

a. PE Services' Position

PE Services states that at no time can PE Services compel a customer to accept a price other than one the customer accepts. During the two-year term of the Offer, PE Services cannot force a customer to accept any price other than 62¢ per therm. The Agreement provides that a customer may only be moved to an index price at the end of the term of the agreement or at the end of subsequent pricing notices. PE Services

states that Paragraph 3 of the Offer is not a means for switching the customer from the fixed rate to a variable rate. Instead, it is a default index price that applies if no other pricing agreement is in place. During the two-year fixed price agreement, the index price does not apply. PE Services contends that the index price was adequately disclosed to consumers in Paragraph 3 of the Agreement as was the consumer's right to reject service from PE Services at an index price.

b. Staff's Position

Staff reiterates the contention that the marketing must be viewed as a whole. The Offer Letter purports to offer a fixed price agreement of 62¢ per therm until September 2005. The Offer Letter contains bold typeface specifically referring to the Offer as involving a fixed price. However, the price is not necessarily fixed under the Agreement. Instead, under Paragraphs 7 and 3 of the Agreement, PE Services may institute a variable price based on an index price calculation. The Agreement contradicts the Offer Letter. Because consumers are attracted to the Offer Letter and not the terms of the Agreement, any provisions inconsistent to the representations on the Offer Letter would confuse consumers.

c. CUB's Position

CUB reiterates the argument that the Offer clearly contains language regarding a fixed price offer of 62¢ per therm. The information regarding the fixed price of the Offer is written in bold typeface on the Offer Letter. However, PE Services maintains several options for transferring a customer off of the fixed price. One such option is the imposition of an index price. CUB avers that the index price is not adequately explained to consumers and the ability to impose the index price on consumer who accepted the Offer contradicts the terms as described on the Offer Letter.

3. Commission Discussion

The existence of the index price and its operation are adequately disclosed to consumers. 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 object to and reject any pricing offer. With respect to the Offer, during the two-year term, PE Services cannot force a customer to accept any price other than 62¢ per therm. We therefore find that the Offer does not allow PE Services to unilaterally change the price at any time as CUB and Staff assert. A customer who accepts the 62¢ per therm offer will receive service at that price for the two-year term.

As the Agreement indicates, the index price only applies where the Offer has expired and no other price agreement has been reached. The existence and operation of the index price are adequately disclosed to consumers considering the Offer.

E. Force Majeure

1. Initial Positions

a. PE Services' Position

Paragraph 6 of the Agreement is a Paragraph entitled "Force Majeure." PE Services states that the *force majeure* provision adequately discloses the conditions under which either party may be excused from performance upon notice to the other party.

b. Staff's Position

Staff did not comment on the *force majeure* provision of the contract.

c. CUB's Position

CUB states that Paragraph 6, Force Majeure, of the Agreement provides the company with an escape clause. CUB states that Paragraph 6 allows PE Services to declare a *force majeure* virtually at its discretion, canceling the contract. CUB claims that the language of the *force majeure* provision is so broad that it allows PE Services the opportunity to cancel the contract if the price of gas goes up or for any reason it chooses. Generally, CUB states that *force majeure* clauses refer to acts of God, or absolute impossibility, not merely changed business circumstances. "A *force majeure* clause interpreted to excuse the buyer from the consequences of the risk he expressly assumed would nullify a central term of the contract." Northern Indiana Public Service Co. v. Carbon County Coal Co., 799 F.2d 265, 275 (7th Cir 1986).

2. Responses

a. PE Services' Position

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." According to PE Services, 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). However, with or without such a non-exclusive list of exemplary events that would constitute *force majeure*, PE Services states that 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). PE Services states that its 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.

b. Staff's Position

Staff did not comment on the *force majeure* provision of the contract.

c. CUB's Position

CUB reiterates its argument that Paragraph 6 of the Agreement provides the company with a loophole in the fixed price offer of 62¢ per therm. CUB states that the *force majeure* provision of the Offer allows PE Services to declare a *force majeure* virtually at its discretion, canceling the contract. The language of the *force majeure* provision is so broad that it allows PE Services the opportunity to cancel the contract if the price of gas goes up or for any reason it chooses. CUB states that *force majeure* provisions are not designed to allow a company to nullify a central term of the contract based on a change in the market.

3. Commission Discussion

PE Services adequately disclosed the *force majeure* provision in the Offer. In the context of a simple, one-page agreement, the Commission finds that an abbreviated definition of force majeure is sufficient. As PE Services explained, such a provision cannot be interpreted to give PE Services the broad termination rights suggested by CUB. What is important for this case is that the *force majeure* provision, however broad CUB may believe it to be, was adequately disclosed to consumers as part of the Offer in the Agreement.

IV. THE LOGO AND DISCLAIMER

83 Ill. Admin. Code Section 550.30 imposes requirements on the marketing of gas utilities and alternative retail gas suppliers ("ARGS"). The Commission notes that the rules, which use the term "ARGS," were adopted prior to the enactment of the Alternative Gas Supplier Law, which coined the term "AGS." PE Services is both an "ARGS" and an "AGS" in the context of this complaint.

A. The Appearance of the Logo

1. Initial Positions

a. PE Services' Position

PE Services states that it is allowed to use the Peoples Energy name. 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." 83 Ill. Admin. Code Section 550.30(b). Moreover, PE Services states that Section 550.30 does not regulate the appearance of logos. PE Services contends that 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 states that its use of the name and logo is acceptable under Illinois law.

b. Staff's Position

Staff states that an analysis of the PE Services logo indicated that the font size for "Peoples" is Goudy Old Style size 20, "Energy" is Goudy Old Style size 12 and "Services" is Gill Sans Size 7. Staff further states that the name Peoples Energy is well known throughout Northern Illinois and that it is strongly associated with a regulated utility. Staff states that name recognition is a valuable marketing tool that can attract customers and instill confidence. Staff states that PE Services' use of the stylized "O" creates logo recognition and confuses consumers as to who is marketing the offer.

c. CUB's Position

Similar to Staff's arguments, CUB states that the way in which PE Services portrays itself is significant to the overall impression of the Offer. Where PE Services makes use of the Peoples Energy name and logo, customers are misled into giving the Offer an unwarranted level of credibility. Although Section 550.30 allows utility affiliates to use the utility name and logo, they should not be used in a manner to mislead consumers.

CUB states that PE Services distorts CUB's argument. CUB is not asserting that PE Services cannot use the Peoples Energy name and logo. Instead, CUB argues that the use of the name and logo is a significant factor in determining whether the solicitation misleads customers.

2. Responses

a. PE Services' Position

Section 550.30 does not regulate the appearance of logos. Staff raised concerns regarding the font size and appearance of PE Services logo, but the Commission's rules do not dictate appropriate font size or style. According to PE Services, 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 has therefore complied with the requirements of the statute and is not required to do more.

b. Staff's Position

Staff reiterates its concern regarding the appearance of the logo and the effect that it has upon consumers considering the Offer. According to Staff, the appearance of the Offer and the PE Services logo is confusingly similar to that of Peoples Energy. Staff argues that the similarity of the logos impacts the ability of the consumers to

differentiate between the related entities so that consumers cannot discern that it is PE Services, an unregulated entity, making the Offer.

c. CUB's Position

CUB states that the name and logo similarities between PE Services and Peoples Energy create significant confusion that misleads consumers considering the Offer. The similarity is so significant that it is difficult to even dispel the confusion through use of a disclaimer. CUB states that customers are familiar with and trust the name of Peoples Energy as a regulated utility. CUB asserts that the appearance of the logo misleads consumers and creates a false sense of credibility through name recognition which affects the marketing.

3. Commission Discussion

The marketing of utilities and related entities is regulated by 83 Ill. Admin. Code Section 550.30. Under our rules, PE Services may use the Peoples Energy name and logo in its advertising.

Section 550.30 does not provide any guidelines for the appearance of logo -- it does not regulate font size or type. The only requirement placed on the use of a utility or parent corporation name or logo is that the affiliated interest include a disclaimer stating that the affiliated interest in competition with ARGIS is not the same company as the gas utility, that the prices of the affiliated natural gas supplier are not regulated by the Illinois Commerce Commission, and that a customer does not have to buy products or services from the affiliated interest in order to receive the same quality service from the gas utility. Thus, without any specific criteria in place to guide our analysis of the appearance of logos, and with no evidence of customer complaints or confusion, we evaluate PE Services' logo with an objective eye.

Staff is apparently concerned that the smaller font size for the word "Services" may cause that element of the logo to escape customers' attention. Nowhere, however, does Staff allege that any element of the logo, including the word "Services" is illegible or unclear. Although it may appear in a smaller font, the word "Services" is readily apparent on the logo and is legible. Section 550.30 expressly allows PE Services to make use of the Peoples Energy name and logo. PE Services presented the name and logo in a legible font and size on its marketing material. Without any further requirements imposed by law, we find no fault with the appearance of PE Services logo.

B. The 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).

1. Initial Positions

a. PE Services' Position

PE Services states that 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 the disclaimer 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 without penalty. PE Services states that the text of the disclaimer complies with the requirements of Section 550.30.

b. Staff's Position

Staff states that PE Services violated Section 550.30 because the Offer Letter does not contain the required affiliated interest disclaimer. Staff states that the logo appears on the Offer Letter but that there is no corresponding disclaimer. Instead, the disclaimer appears on the reverse side of the Offer Letter as a part of the Agreement. Staff stated that the Peoples Energy name and logo are known to individuals throughout Northern Illinois. Staff states that the name recognition serves as a valuable marketing tool and instills consumer confidence. Use of the Peoples Energy stylized logo also creates confusion. In the absence of the affiliated interest disclaimer on the same page as the logo, Staff states that PE Services Offer Letter misleads customers into believing that PE Services is actually the regulated utility and thus violates Section 550.30.

c. CUB's Position

Similarly, CUB states that the use of the Peoples Energy name and logo gives the Offer credibility that it would not otherwise have if the Offer came from a non-utility. Customers are led to believe that the Offer is related to a regulated utility and thus view the Offer with a different level of scrutiny than if the offer came from a non-regulated entity. CUB states that the net impression of the Offer should be considered which includes the impact of the logo and Peoples Energy name. Neither the Offer Letter nor the initial telephone sales call script contains the affiliated interest disclaimer. Instead,

the disclaimer appears on the Agreement and as part of the telephone verification. As such, the marketing is misleading to customers.

2. Responses

a. PE Services' Position

An argument based on 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. PE Services states that the two documents appeared on the reverse sides of a single piece of paper and constitute a single, integrated marketing effort. 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.

In the context of telemarketing, PE Services testified that it only called those individuals to whom it mailed the Offer and who 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. Contrary to CUB's assertion, Section 550.30 does not state that the required affiliate disclosure must be made in what CUB calls the "initial sales call." In the present matter, the verification process is performed as part of the telephone call in which the customer accepts the offer. PE Services states that after the customer accepts the offer, the person handling the sales call verifies the acceptance and provides the disclaimer as a part of the verification. The rule does not specify the manner or timing of the required disclosure in the context of telemarketing. Moreover, PE Services asserts that it 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 states that it complied with the requirements of Section 550.30(c).

b. Staff's Position

Staff reiterates its contention that the Offer Letter should be considered separately from the Agreement. Staff states that it is the Offer Letter and not the fine print of the Agreement that attracts customers. As such, Staff states that the credibility and impact of the Offer are affected by the use of the Peoples Energy name and stylized "O" in the logo. Without the required affiliated interest disclosure, consumers are misled to presume that the Offer has been extended from a regulated utility that is a familiar and trusted entity in Northern Illinois.

In order to ensure that the Offer does not create confusion or an unwarranted level of credibility, Staff states that the required affiliated interest disclaimer should appear on all documents that make use of the Peoples Energy name or logo. Given extensive use of the Peoples Energy logo by the Peoples Energy companies, Staff states that customers have difficulty differentiating between the regulated utility and PE Services, an unregulated entity. The resulting customer confusion creates a benefit to PE Services while decreasing consumer confidence. A disclaimer appearing on the

reverse side of a letter containing the stylized “O” logo and Peoples Energy name does not sufficiently inform customers of the identity of the entity making the offer.

c. CUB’s Position

CUB also states that the Offer Letter should be considered independently from the Agreement. Additionally, CUB agrees with Staff’s contention that the current disclaimer employed by PE Services did not provide a sufficient indication that PE Services is a separate entity from Peoples Energy. CUB states that the absence of the disclaimer on the same page as the name and logo gives the Offer an inflated level of credibility.

CUB states that this problem is also true in the context of telemarketing. The telemarketing script used by PE Services did not contain the required disclosure in the initial sales call. Thus, consumers might receive a call offering service under the agreement and be unaware that the offer was extended by PE Services and not Peoples Energy. It is not until after they have agreed to accept service that they receive the required disclosure. Moreover, although PE Services claimed that telemarketing only involved customers who had been sent the Offer, Ms. Ito was unaware of whether PE Services verified that the consumer had indeed already received the Offer in the mail.

3. Commission Discussion

Section 550.30 imposes requirements on utility affiliates who market in competition with ARGS using the utility’s name or logo. There are two two related issues with regard to PE Services’ incorporation of the required disclaimer.

First, CUB and Staff challenge the placement and adequacy of the disclaimer in the context of the written offer. They challenge the adequacy of placing the disclaimer on the back side of the Offer while the logo and Peoples Energy name appear on the front. Staff also questions whether the disclosure is sufficient to clarify the distinction between Peoples Energy and PE Services where Peoples Energy is a name recognized by many in Northern Illinois.

CUB’s and Staff’s claims are rejected. A cursory examination of the Offer reveals that the Agreement appears on the back side of the Offer Letter. An attempt to separate the two components of the Offer disregards the fact that they appear on one piece of paper. Moreover, customers who accept the Offer by mail are required to sign a statement indicating that they have read and understand the terms and conditions of the Agreement. Consumers would therefore be made aware that the Offer was composed of more than just the one side of the Offer Letter.

While it is true that the logo and Peoples Energy name appear on the Offer Letter and the affiliated interest disclaimer appears on the Agreement, this is not a violation of Section 550.30. Section 550.30 does not regulate the appearance or location of the

disclaimer. It only states that a disclaimer must be included. PE Services did include a disclaimer on its marketing material and therefore has met the requirements of the regulation. Although Staff states that the Peoples Energy name is widely known and thus might require added disclaimers to prevent confusion, by law, PE Services has complied with the requirements of Section 550.30 and is not required to do more. CUB's and Staff's claims are therefore denied.

Second, CUB contends that the required affiliated interest disclosure was not properly incorporated into PE Services' telemarketing efforts. PE Services accepted inbound calls regarding the Offer and placed outbound calls to a portion of the individuals who had been mailed the Offer. If a customer agreed to accept service, PE Services required the consumer to speak with a representative in order to verify the decision. At this time, as part of the verification script, PE Services issued the required affiliated interest disclaimer.

CUB does not appear to challenge the content of the disclosure in the telemarketing context and instead challenges the timing. CUB creates a distinction between the initial conversation with a sales representative and the verification process. After making this distinction, CUB states that PE Services should make the required disclosure what CUB refers to as the "initial sales call" rather than the verification.

CUB's arguments regarding the timing of the disclosure in PE Services' telemarketing are rejected. PE Services correctly notes that Section 550.30 does not provide any guidance for the use of disclaimers in telemarketing. While it is clear that the disclosure must be made, the timing of the disclosure is not regulated by the Code. CUB's attempt to create a distinction between the different stages of the call is to no avail. Although PE Services does not provide the required disclaimer at the beginning of the conversation, it does provide the disclaimer in the verification where the customer indicates that she is willing to accept service from PE Services under the pricing, terms and conditions of the agreement. This is all part of the same communication with the customer. At this point, the customer still has the option to change her mind and decline service under the Offer. This timing is comparable to the Code's requirement regarding television and radio advertisements for which the disclaimer is to be given at the conclusion of the communication. Because Section 550.30 does not address the provision of disclaimers in the telemarketing context, and because PE Service supplied the required disclaimer at a time when customers were still able to evaluate and reject the Offer, PE Services has complied with the affiliated interest disclaimer requirements of Section 550.30.

V. REMEDIAL MEASURES

The Staff and CUB each proposed various remedial measures and CUB proposed the imposition of a monetary penalty. Because we have found that the Offer satisfied the requirements of the Act, there is no need to consider and rule on those measures.

VI. FINDINGS

The Commission, having given due consideration to the entire record and being fully advised in the premises, is of the opinion and finds that:

- 1) The statements of fact and conclusions of law set forth in the prefatory portion of this Order are supported by the evidence of record and are hereby adopted as finding of fact and conclusions of law;
- 2) the Offer was composed of the Offer Letter and Agreement, which appeared on the reverse sides of a single piece of paper and thus constitute a single, integrated marketing effort for purposes of analysis under Section 19-115(f);
- 3) the purpose of Section 19-115 as articulated in the Nicor Gas Customer Select Order provides an objective basis to guide the application of the adequate disclosure standard enumerated in Section 19-115 so that there is no need to look beyond the Public Utilities Act for guidance;
- 4) the limitation of the Offer to 2,000 consumers was not misleading marketing where PE Services was able to locate additional supplies of gas at a price and volume that allowed for subsequent expansion of the Offer to additional consumers;
- 5) the price, terms and conditions of the Offer were all adequately disclosed to consumers considering service under the Offer;
- 6) the use of the Peoples Energy name and logo was appropriate, and the appearance of the logo complied with the requirements of Section 550.30;
- 7) the disclaimer contained on the Agreement satisfied the requirements of Section 550.30 as did the disclaimer contained in the telemarketing verification script and confirmation letter; and
- 8) any motions, objections, or petitions in this proceeding that have not been specifically ruled on should be disposed of in a manner consistent with the finding and conclusions herein.

IT IS THEREFORE ORDERED that judgment be entered in favor of PE Services on all counts.

IT IS FURTHER ORDERED that Staff and CUB's recommendations be rejected as either moot or unwarranted in light of PE Services' actions subsequent to the filing of the complaint, including distribution of the Supplemental Letter in compliance with the recommendations of Staff.

IT IS FURTHER ORDERED that any motions, objections, or petition in this proceeding that have not been specifically ruled on should be disposed of in a manner consistent with the finding and conclusions herein.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Admin. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this ____th day of _____,
2004.

(SIGNED)

Chairman (SEAL)

Edward C. Hurley

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