STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission on its own motion Northern Illinois Gas Company d/b/a NICOR Gas Company Reconciliation of Revenues collected under Gas Adjustment Charges with Actual Costs prudently incurred	))))))))	Docket No. 01-0705
Illinois Commerce Commission on its own motion Northern Illinois Gas Company d/b/a NICOR Gas Company Proceeding to review Rider 4, Gas Cost, pursuant to Section 9-244(c) of the Public Utilities Act	)))))))	Docket No. 02-0067
Illinois Commerce Commission on its own motion Northern Illinois Gas Company d/b/a NICOR Gas Company Reconciliation of Revenues collected under Gas Adjustment Charges with Actual Costs prudently incurred	)))))))	Docket No. 02-0725

CITIZENS UTILITY BOARD'S
AND COOK COUNTY STATE'S ATTORNEY'S OFFICE
<u>VERIFIED RESPONSE TO NICOR'S MOTION TO COMPEL</u>

Once again Northern Illinois Gas Company (Nicor) has filed a last minute request for expedited action by this Commission based on a self-created time crisis and on erroneous facts and law. Contrary to Nicor's assertions, both oral to the Citizens Utility Board (CUB) and through this Motion, the law does not clearly require CUB and the Cook County State's Attorney's Office (CCSAO) to turn over the documents in question.

In fact, the law does not support Nicor's position at all. Nicor's Motion is based on inaccurate citation of cases and misstatements regarding the implications of the cases. Hence, while Nicor speaks with bluster, examination of the cases reveals much more hyperbole than substance.

The law does not specifically address the issue of what a testifying expert witness must provide in discovery. There is no rule that specifically addresses this issue. The case law is vague at best, focusing on witnesses turning over documents on which they specifically rely in producing testimony, which CUB/CCSAO has already done. Most importantly, Nicor ignores the reality of the Commission process, where expert witnesses work with attorneys on cases in a way that would be altered significantly by a ruling requiring CUB/CCSAO to turn over the documents at issue here.

While the ALJs granted expedited briefing on the Motion to Compel to the prejudice of the Citizens Utility Board (CUB) and the Cook County State's Attorney's Office (CCSAO), the ALJs should not grant Nicor's faulty request to compel CUB/CCSAO to turn over four memos and approximately 85 e-mails from its expert witness to CUB/CCSAO's attorneys. These documents are protected by the attorney-client and attorney-work product privileges.

I. THE LAW PROTECTS ATTORNEYS' ABILITY TO PREPARE THEIR CASE

The documents withheld by CUB/CCSAO fall under both the attorney work product and attorney-client privileges. Generally, in Illinois the scope of such privileges are defined by Illinois Supreme Court rules[1] and case law. Whether the privileges apply

[1] However, the judges in this proceeding have indicated Supreme Court Rules do not apply, so a review of the rules is not binding.

in a specific instance require both a factual and legal analysis. The starting place for the Commission's analysis would be the Commission's own rules of practice, and the Illinois Supreme Court Rules. The Commission discovery rules offer virtually no guidance in this situation, since they merely make a general statement encouraging full disclosure of relevant facts. Such policy is universally recognized, as is the policy that the work product and attorney-client privileges allow attorneys to prepare their cases without sharing their mental impressions.

The Illinois Supreme Court Rule, which Nicor does not quote in its Motion, states as follows:

> (2) **Privilege and Work Product.** All matters that are privileged against disclosure on the trial, including all privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney.

Ill. Sup. Ct. Rule 201(b)(2). One can only conclude that the Company does not provide the text of this rule because it believes the rule does not support its position. The rule provides some guidance, certainly no clarity. The guidance is that "[m]aterial prepared by or for a party in preparation for trial," is protected.

If Mr. Mierzwa were a consultant not testifying at trial, clearly his communications with CUB would be protected under Rule 201(b)(3). However, the Rules are silent regarding communications with expert witnesses testifying at trial. Thus, the Commission must examine the case law on this issue. Such examination demonstrates that parties must clearly provide all material upon which the witness bases their testimony – not all material. The law and facts do not support discovery of all Mierzwa-authored documents.

In considering Nicor's Motion, the Commission must note that most importantly, there has been no wholesale withholding of documents from Nicor by CUB/CCSAO. To the contrary, all of the workpapers of CUB/CCSAO witness Jerome Mierzwa have been turned over to Nicor. CUB/CCSAO turned over the workpapers to Nicor shortly after filing Mr. Mierzwa's testimony. After that production, Nicor requested the handwritten notes of Mr. Mierzwa and all 71 pages of those notes also were produced in response to Nicor's oral request. All documents reviewed by Mr. Mierzwa have been identified by CUB/CCSAO to Nicor. Indeed, the vast majority of documents upon which Mr. Mierzwa bases his testimony are cited in his testimony and are documents that were originally produced by Nicor.

In addition, Nicor totally misrepresents the statements made by CUB counsel during private and confidential negotiations over potentially producing the documents. The disclosure of the documents in question would not be harmful to CUB and no such statement was made by CUB counsel. In fact, CUB is seeking to maintain the integrity of the process by asserting the privilege, not impede the search for truth.

II. DOCUMENTS ARE PROTECTED BY LAW FROM DISCOVERY BY NICOR.

A. Documents Do Not Fit Under Cases Cited By Nicor Since They Were Prepared By, Not For, The Expert.

The cases cited by Nicor in support of its Motion to Compel (one Indiana district court case, one California district court case, one Illinois district court case, and one 7th Circuit case based on a rule long superseded) are based on the premise that the material must be turned over because it is material that was reviewed by the expert in preparation of his testimony. In *Karn v. Rand*, 168 F.R.D. 633 (N.D. Ind. 1996), the court found

there is a belief "that expert testimony has often been subject to improper influences, and that counsel can all too easily color the expert's opinion by simply controlling the expert's access to information." 168 F.R.D. at 639. The same reasoning was followed by the court in *Barna v. United States*, 1997 WL 417847 (N.D. Ill. 1997) also cited by Nicor.

The problem for Nicor is twofold. First, the cases are interpreting a specific federal rule. Second, the courts are reviewing situations in which documents have been prepared by others, and then reviewed by the expert witnesses creating the perception that there was an attempt to influence the witness' testimony.

The courts in Nicor's cited cases base their findings on an interpretation of Federal Rule of Civil Procedure 26, which does not apply to this proceeding. Contrary to Nicor's assertion that Rule 26 is analogous to Ill. Sup. Ct. Rule 201, (Nicor Motion at 7, FN 4) Rule 26[2] differs significantly, stating:

> [A] party intending to offer expert testimony must provide a report of the expert witness' testimony which "shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions…"

Id. at 2, citing Fed. Rule Civ. Pro. 26. Moreover, Fed. Rule 26 (a)(2) applies to initial disclosures at the time parties submit their witness lists. In fact, CUB/CCSAO are already in compliance with Rule 26. CUB/CCSAO have submitted the data and information Mr. Mierzwa considered in forming his opinion.

The Commission must also consider that these cases do not fit the factual situation at hand. Unlike *Karn* and *Barna*, where the witnesses relied on documents provided to them by counsel, Counsel for CUB/CCSAO did not give the subject documents to Mr. Mierzwa to review. **The documents in question came from Mr.**

[2] CUB/CCSAO notes that the ALJs ruled that "Supreme Court Rules do not apply to our cases." ALJ Haynes, May 12, 2003, Tr at 216 lines 3-4.

Mierzwa. Thus, it is impossible that the documents caused an improper influence on Mr. Mierzwa's testimony, which is the harm that the courts are trying to prevent when requiring documents to be produced to the opposing side.

Nicor not only ignores the factual difference in *Barna* that the case involved documents given by counsel to the witness, it also ignores the analysis by the court that discusses the significant split in how courts have ruled on this issue. After discussing *Karn v. Rand*, the court notes:

> In contrast, the court in *Haworth, Inc. v. Miller, Inc.*, F.R.D. 289, 295-96 (W.D. Mich. 1995), held that the extremely high privilege granted to opinion work product could not be overcome without clear and unambiguous language in the rules or a statute, and because no such language existed, opinion work product which was disclosed to an expert was not discoverable. *Accord Magee v. The Paul Revere Life Ins. Co., F.R.D. , 1997 U.S. Dist. LEXIS 5463*, No. CV 95-4574(ADS), *1997 WL 199071*, at 13 (E.D.N.Y. March 21, 1997); *All West Pet Supply Co. v. Hill's Pet Prods., 152 F.R.D. 634, 639* (D. Kan 1993).

Barna v. United States at 3, 4.

Moreover, there is no bright line mandating turning over material merely because an expert witness reviewed the material as Nicor asserts in its Motion. In *Trimec v. Zale Corp.*, 1992 WL 245602, the court denied a motion to compel an attorney to produce letters sent to the expert witness. The court found that the material "only becomes discoverable if the experts rely upon it in forming their opinions." 1992 WL 245602 at *1. Moreover, the court found that it "must still heed the mandate of Federal Rule of Civil Procedure 26(b)(3) which requires them to protect against disclosure of the mental impressions, conclusions, and opinions or legal theories of an attorney." *Id*. at *2. In the same case, the court found that even though the attorney and the expert witness jointly drafted answers to interrogatories, the attorney did not have to turn over the drafts since

the witness testified that the final answers reflected, "exactly what he wanted to say." *Id*. at *3.

Nicor stands logic on its head by arguing that Mr. Mierzwa's own memoranda and e-mails to CUB/CCSAO resulted in CUB/CCSAO's attorneys influencing and coloring his testimony in such a manner as to require disclosure of the documents to Nicor. It should be noted as well that in *Bauter v. Reding*, 68 Ill. App. 3d 171 (Third Dist. 1979), which Nicor asserts stands for the proposition that failure to produce an entire file related to the litigation results in contempt, the court was dealing with the issue of estoppel. As a result, the court stated, "the issues in the present case ***requiring the discovery complained of are the exception and not the rule.*** In a normal case, which would not involve estoppel, many of the documents ordered produced would not be discoverable . ." *Id.* at 176 (emphasis added).

The facts in this case give rise to the material being protected by the attorney-client privilege as well. Nicor dismisses this claim by stating that Mr. Mierzwa is not an attorney, therefore, there is no predicate for the privilege. This assumption ignores the teachings by the Illinois Supreme Court in *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103 (1982) concerning the attorney-client privilege being extended to the control group of a corporation. "The purpose of the attorney-client privilege is to encourage and promote full and frank consultation between a client and legal advisor by removing the fear of compelled disclosure of information." *Id.* at 118. In a corporate setting, the privilege is extended to the control group and was described by the court as follows:

> We believe that an employee whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority, is properly within the control group. . . . Thus, if an employee of the status described is consulted for the purpose of determining what legal action the corporation will pursue, his communication is protected from disclosure. *Id*.

From the facts it is clear that Mr. Mierzwa was a member of the control group for CUB/CCSAO. The four memoranda and the e-mails were provided to the control group as confidential and remained confidential.

B. Documents Were Prepared By Expert At Request Of Counsel.

The descriptions of the four documents withheld jointly by CUB/CCSAO were disclosed to Nicor on December 17. Each of the four documents was prepared by Mr. Mierzwa and sent to counsel for CUB/CCSAO. Three of the memos also were reviewed by the top management of CUB. The fourth memo, identified as "Deposition Material," was only reviewed by counsel to assist in preparation of the depositions of Nicor's witnesses. The documents were prepared by Mr. Mierzwa at the request of counsel so that counsel and the top management of CUB could better understand and make strategy decisions concerning the case. The documents have been kept confidential by CUB/CCSAO and only have been distributed to counsel for both entities and the top management of CUB. The documents are[3]:

1. Memo summarizing the Lassar Report dated 11/1/02.
2. Memo entitled "Identification of Issues" dated 9/24//02
3. Memo summarizing Nicor's Direct on Reopening dated 8/13/03.
4. Memo entitled "Deposition Material" dated 6/19/03.

[3] As ordered, the documents are being produced to the ALJs under seal for in-camera review.

In addition to these four memos, CUB is withholding approximately 85 e-mails from Mr. Mierzwa to CUB attorney Robert J. Kelter, Executive Director Martin Cohen, and Policy Director David Kolata.

As the ALJs will quickly see upon review of these documents, they are intended to and do provide full and frank advice to the control groups of the respective entities. Moreover, they reveal the litigation strategy of counsel. As a result, the documents are protected from discovery from Nicor.

III. CUB/CCSAO'S POSITION IS NOT IN ANY WAY INCONSISTENT WITH ITS OWN MOTION TO COMPEL

Nicor argues that CUB is taking inconsistent positions by arguing that communications between CUB and Mierzwa are protected, because CUB filed a Motion to Compel against Nicor. Nicor Motion at 4. Nicor's argument ignores the very different facts of the two motions. CUB's Motion to Compel requested documents relating to the Report To The Special Committee Of The Board of Directors of Nicor Inc. CUB's data requests addressed a broad array of issues so comparison between the two is difficult. However, CUB Data Request 11.07 asked for copies of workpapers from Mr. Lassar. "**Please provide a copy of all workpapers, calculations and documentation supporting each adjustment and opinion included or expressed in the Report**." CUB DR 11.07. In essence, CUB asked Sidley/KPMG specific questions about how it arrived at conclusions in the report. Nicor argued that those workpapers were protected. In contrast, CUB turned over Mr. Mierzwa's workpapers. However, Nicor asks for much more than workpapers:

Please produce all documents that analyze, evaluate, discuss, or otherwise evidence the performance of a study, computation, compilation or calculation performed in connection with CUB's review of the gas sale, including the accounting or recording thereof, discussed at pages 20 to 26 of the Lassar Report.

While CUB asked for documents specifically relating to the Lassar Report, Nicor requests all communications between CUB and its witness. Each data request at issue is similarly overly broad in its scope. While CUB has provided all documents that relate to Mr. Mierzwa's testimony, it has withheld documents that Mr. Mierzwa produced for CUB/CCSAO to clarify/explain issues related to strategy or specifically discussing strategy. These are documents such as memoranda and e-mails that provide explanation and analysis of issues for CUB's attorneys and executive director and policy director, and do not provide Nicor with information that it needs to make its case.

IV. CONSUMER REPRESENTATIVES MUST RELY ON OUTSIDE EXPERTS FOR ADVICE TO UNDERSTAND AND PREPARE CASE

The discovery rules must be considered in the context of this Commission's own process. CUB/CCSAO by law and statute represent the residential and small commercial consumers and people of the State of Illinois in this proceeding. The budgets of both agencies are limited and neither has experts on staff to advise them on the complex issues that frequently arise in utility cases. This case is especially complex due to the misrepresentations and fraudulent actions of Nicor. Consultation with an expert was vital to CUB/CCSAO's understanding of this case. Because of the budget constraints placed on public agencies such as CUB and CCSAO, neither CUB nor CCSAO could hire one expert to provide counsel with technical advice and then retain a second expert to provide testimony.

The expert retained by CUB/CCSAO functioned in an advisory role to top management. Because of the expert's obvious expertise in this area, CUB/CCSAO would not and does not make decisions concerning the case without seeking the expert's opinion and advice. The expert's advice in fact forms the basis of any final decision by CUB/CCSAO's top management.

In this case, Mr. Mierzwa was retained by CUB/CCSAO to give guidance and advice regarding the issues in these dockets. Counsel and top management for CUB/CCSAO relied upon the guidance and advice offered by Mr. Mierzwa in making the strategic decisions in these dockets.

The parties that appear before the Commission know and understand how the process works. In fact, CUB's standard consultant contract (attached) specifically requires all consultants to assist with the legal elements of a case. This is done with the understanding that communications between the attorneys and consultant are protected. It is common knowledge that Commission Staff attorneys and Staff witnesses work hand in hand developing both factual arguments and legal strategy.

No intervenor has ever hired a separate consultant in addition to a testifying witness, because there is an understanding that certain communication can occur between the attorneys and the witnesses that will not be disclosed. Requiring CUB to turn over the documents would have a significant effect that goes well beyond the limited scope of this proceeding – it would forever change the way all parties at the Commission approach cases in a very negative way.

CONCLUSION

There is no material prejudice to Nicor caused by CUB/CCSAO asserting its claim of privilege. CUB/CCSAO have turned over all of its witness' work papers. Moreover, the denial of privilege would be inconsistent with long-standing Commission practice. Parties work hand in hand with witnesses in a manner that requires the exchange of ideas relating to legal strategy, as the legal and factual elements in ICC proceedings are inextricable. The denial of the privilege would have a significant negative effect on intervenors and Staff in future proceedings.

CUB/CCSAO submit that based on the argument set forth above, Nicor's Motion should be denied. Given the complexity of this issue, and the very short time allotted for CUB/CCSAO to respond to Nicor's Motion, CUB/CCSAO requests that the Commission schedule a hearing. CUB/CCSAO are still reviewing the law and documents and want an opportunity to review Nicor's Reply due next week. At that time if CUB/CCSAO feel a hearing is not required it will notify the ALJs.

In terms of timing, the materials withheld—if required to be turned over—should not alter the rebuttal testimony of Nicor to be filed on January 16. As the ALJs will see during the in camera review, there is no material inconsistency in the withheld documents and Mr. Mierzwa's testimony. The documents are to assist CUB/CCSAO counsel and top management determine strategy in this case. Even if the materials were appropriate for cross examination of Mr. Mierzwa, which CUB/CCSAO does not believe, such cross-examination is not scheduled for months, so Nicor's claim that this matter must be decided immediately should be rejected.

Respectfully Submitted,
Citizens Utility Board

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AFFIDAVIT OF ROBERT J. KELTER

Before me the undersigned notary public did appear Robert J. Kelter, who being sworn, did state and depose as follows:

1. My name is Robert J. Kelter. I am the Director of Litigation for the Citizens Utility Board (CUB) and I am personally familiar with the facts stated herein. I am authorized to make this affidavit on behalf of CUB.
2. CUB is a non-profit agency of the State of Illinois with the statutory duty to represent the residential and small commercial customers of utilities in this state.
3. The funding of CUB is limited and, as a result, CUB is restricted in its ability to intervene and participate in matters before the Illinois Commerce Commission and the courts.
4. The staff of CUB consists of several attorneys, an executive director, a policy director and several other directors.
5. As director of litigation, I am in charge of and, in consultation with the executive director and policy director, make decisions as to which cases CUB will become involved and the extent of the involvement.
6. To assist me and the other directors at CUB in complex cases we hire outside experts in particular fields of expertise. In this case because of its complex nature, we hired Jerome Mierzwa as an expert. His function included briefing the decision makers at CUB as to the issues in the case and potential strategies.
7. At my request, he prepared the four memos that are the subject of the motion to compel. These memos were kept confidential by myself and the other parties who received copies. The copies were limited to myself, outside counsel hired for this case, the executive director and the policy director.
8. In addition, Mr. Mierzwa sent several e-mails to me. Those e-mails were not forwarded nor shared with others outside the control group.

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Notarized this 9th day of January 2004.

Jennifer Bontrager
Notary Public

OFFICIAL SEAL
JENNIFER BONTRAGER
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:10/09/07