

**EXCEPTIONS OF
PEOPLES ENERGY SERVICES CORPORATION
TABLE OF CONTENTS**

<i>I.</i>	<i>The Allegations in the Pleadings.....</i>	<i>1</i>
<i>II.</i>	<i>The Motion to Dismiss</i>	<i>4</i>
<i>III.</i>	<i>The Affidavits and the Testimony Presented at the Hearing</i>	<i>5</i>
A.	<i>Ms. Ito’s Testimony</i>	<i>5</i>
B.	<i>The Testimony of Ms. Howard</i>	<i>7</i>
<i>IV.</i>	<i>PESCO’s Subsequent Mailing</i>	<i>8</i>
<i>V.</i>	<i>The AGS Act.....</i>	<i>10</i>
<i>VI.</i>	<i>Application of the Consumer Fraud Act.....</i>	<i>10</i>
<i>VII.</i>	<i>Whether Section 19-115(f) of the AGS Act is Unconstitutionally Vague</i>	<i>12</i>
<i>VIII.</i>	<i>What Documents are at Issue</i>	<i>14</i>
<i>IX.</i>	<i>Billing Options and Payment Options.....</i>	<i>16</i>
<i>X.</i>	<i>The Price of Gas.....</i>	<i>17</i>
<i>XI.</i>	<i>Termination.....</i>	<i>19</i>
<i>XII.</i>	<i>The Termination Clause</i>	<i>21</i>
<i>XIII.</i>	<i>PESCO’s Ability to Change the Price of Gas</i>	<i>22</i>
<i>XIV.</i>	<i>Returning a Consumer to the Delivering Utility Pursuant to Paragraph 7</i>	<i>23</i>
<i>XV.</i>	<i>Termination by a Customer pursuant to Paragraph 7</i>	<i>24</i>
<i>XVI.</i>	<i>The Choice of Venue Clause</i>	<i>25</i>
<i>XVII.</i>	<i>Customer Confusion between PESCO and Peoples Gas and Use of the Peoples Energy Corporation Logo.....</i>	<i>26</i>
<i>XVIII.</i>	<i>Stating that the Offer was Limited to the First 2,000 Customers.....</i>	<i>28</i>
<i>XIX.</i>	<i>PESCO’s Subsequent Remedial Repairs and Remedies</i>	<i>29</i>
<i>XX.</i>	<i>Findings and Ordering Paragraphs</i>	<i>32</i>

**EXCEPTIONS OF
PEOPLES ENERGY SERVICES CORPORATION
STATE OF ILLINOIS**

ILLINOIS COMMERCE COMMISSION

Citizens Utility Board :
:
Complaint requesting the ICC to order : **03-0592**
Peoples Energy Services to cease and :
desist misleading marketing of gas offering.:

ADMINISTRATIVE LAW JUDGE’S PROPOSED ORDER

By the Commission:

On October 1, 2003, the Citizens Utility Board (“CUB”) filed an Amended Complaint (correction of September 30, 2003 Complaint) pursuant to the Alternative Gas Supplier Law, (the “AGS Act”) 220 ILCS 5/19-100 *et seq.* In that Complaint, CUB averred that a marketing campaign done by Peoples Energy Services Corporation (“PESCO”) violated the AGS Act. On October 30, 2003, CUB filed the First Amended Complaint.

On October 16, 2003, the Administrative Law Judge (the “ALJ”) denied a Motion to Dismiss filed by PESCO, and this matter came on for an evidentiary hearing before a duly authorized Administrative Law Judge of the Illinois Commerce Commission on November 21, 2003. Testifying on behalf of Commission Staff (“Staff”) was Joan Howard, a Consumer Policy Analyst in the Commission’s Consumer Services Division. Testifying on behalf of PESCO was Wendy Ito, the Director of Business and Planning for PESCO. At the conclusion of the hearing, the record was marked “Heard and Taken.” The record was reopened on January 5, 2004, pursuant to motions filed by CUB and PESCO. A short, additional evidentiary hearing convened on January 9, 2004, and the record was again marked “Heard and Taken” on that date. Staff, CUB and PESCO filed Posttrial briefs and Reply Briefs.

I. The Allegations in the Pleadings

The following is gleaned from CUB’s Amended Complaint, the Amendment to that Complaint, PESCO’s Answer and PESCO’s Answer to the subsequent Amendment, as well as any attachments to these pleadings:

PESCO is an alternative retail gas supplier that is certificated by this Commission pursuant to the AGS Act, which is part of the Public Utilities Act. As an AGS supplier, PESCO is not subject to many of the regulatory requirements, to which, companies like PESCO’s affiliate, The Peoples Gas Light and Coke Company, (“Peoples Gas”) are subject.

On September 8, 2003, PESCO began a mailing campaign to solicit customers. PESCO's mailing consisted of two items, a letter (the "offer letter") and an Agreement. A consumer is to sign and return the Agreement to PESCO in order to participate in the program. The letter and the Agreement consist of two sides of one document.

The offer letter stated that customers can "lock in" gas service at a fixed price of \$.62 per therm until September, 2005. It warned that high gas prices are imminent and suggests that use of this program will provide protection from high prices. (Answer to Am. Complaint, Attachments). CUB takes issue with whether PESCO customers can really "lock in" to a fixed price. According to CUB, the "fine print" in the Agreement allows PESCO to change the price of gas purchased pursuant to the Agreement at virtually any time during the lifetime of the Agreement. CUB avers that the Agreement allows PESCO to submit a new offer, or a "pricing notice," including a revised price, and, absent the customer's written objection to that offer within 10 days of its receipt, the offer will be deemed accepted. (Am. Complaint, par. 8, Answer to Am. Complaint, Attachments, Agreement). Also, the Agreement allows PESCO to, when a pricing notice has expired or is otherwise no longer in effect, charge customers an index-based price. (Answer to Am. Complaint, Attachments, Agreement, par. 3).

CUB also argues that the charge incurred, in fact, is not just \$.62 per therm. It is \$.62 per therm, all charges assessed or collected by PESCO on a cost-pass-through basis, and a monthly administrative fee of \$2.95. Nowhere in the Agreement or in the letter is an explanation as to what the pass-through costs are, or, an approximation as to how much these costs are. (Answer to Am. Complaint, Attachments, Agreement, par. 4).

CUB also takes issue with whether PESCO has really committed itself to providing its customers with gas until September, 2005. The Agreement allows PESCO to return a customer to its previous utility, "if in Company's sole judgment, 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." (Answer to Am. Complaint, Agreement, par. 7). Also, the Agreement can be terminated when PESCO declares a *force majeure*, which is, according to the Agreement, "[A]ny event beyond the reasonable control of the non-performing party and that could not be remedied by the exercise of due diligence." (Answer to Am. Complaint, Attachments, Agreement, par. 6). CUB cites law regarding *force majeure* clauses, which provides that these clauses excuse performance due to impossible situations, not just changed business circumstances. Essentially, CUB concludes that the *force majeure* clause in the Agreement allows PESCO to escape from its contractual responsibility for providing gas in a manner that is contrary to law. (Am. Complaint, par. 18).

While the letter advises that the program expires in September of 2005, in fact, according to CUB, after September 2005, the Agreement extends automatically from year to year, unless it is cancelled on 60 days written notice prior to the end of the term. (Answer to Am. Complaint, Attachments, Agreement, par. 7). Additionally, while

PESCO can terminate the Agreement pursuant to the above-cited provisions, customers must pay a steep cancellation fee, if they cancel the Agreement (\$.15 per therm, multiplied by the number of therms of gas the consumer would have used during the remaining life of the Agreement, the calculation of which, is based on an undefined "good faith estimate" made by PESCO). (See, Answer to Am. Complaint, Attachments, Agreement, par. 7).

Furthermore, the letter did not advise consumers that PESCO's payment requirements are quite different from those of a regulated utility. PESCO requires payment within ten days of the invoice date, instead of 21 days after the date of the postmark on the bill, which is what is required of a delivering utility. (See, 83 Ill Adm. Code Sec. 280.90(c)). According to CUB, providing customers with such a little amount of time to pay their bills increases the likelihood that customers will incur late charges. (Am. Complaint, par. 23).

CUB additionally avers that the offer letter stated that the offer is only good for the first 2,000 customers, thus, it misleads customers into thinking that they need to act on the offer immediately. CUB contends that limiting the offer in such a manner scares consumers into accepting this offer immediately, without taking the time to consider it, or, to "shop around" for other offers. Since the mailing, however, PESCO has announced plans to enroll customers in addition to the first 2,000. (Am. Complaint, pars. 3, 5, 7).

PESCO's marketing materials here use the same logo and a name that is very similar to that used by Peoples Gas, as, Peoples Gas markets itself as Peoples Energy. CUB avers that use of this logo gives the offer credibility it otherwise would not have. (Am. Complaint, par. 27). However, the mailing did contain the following disclaimer:

Peoples Energy Services is not the same company as Peoples Gas. The rates of non-utility gas suppliers like Peoples Energy Services are not regulated by the Illinois Commerce Commission. You do not need to buy products or services from Peoples Energy Services in order to receive the same quality service from Peoples Gas.

(Answer to Am. Complaint, Attachments, Agreement).

Also, the Agreement provides that "The parties agree any litigation arising out of this Agreement will be conducted in a court located in Cook County, Illinois." (Answer to Am. Complaint, Attachments, Agreement, par. 10). Thus, even though many customers may be entitled to file a Complaint with this Commission and many customers in the service territories of Nicor Gas Company ("Nicor") and North Shore Gas Company ("North Shore") do not live in Cook County, they are required, pursuant to the Agreement, to file a complaint resolving any dispute they have with PESCO in the Circuit Court of Cook County. This provision was not a subject of CUB's Complaint.

Further, PESCO solicited customers by telephone regarding the offer. CUB avers that PESCO's telemarketing offer misleads customers in the same way as the written solicitation did, except the telemarketers do advise consumers of the \$2.95 monthly administration fee. (Answer to Amendment to Amended Complaint, pars. 1-3).

CUB contended that the above-stated facts, taken *in toto*, constitute deceptive or misleading marketing practices, which violate Section 115(f) of the AGS Act. Also, CUB urged this Commission to interpret Section 115 of the AGS Act in a manner similar to the manner in which the courts have construed the Consumer Fraud and Deceptive Business Practices Act, (the "Consumer Fraud Act") citing *Citizens Utility Board*, Docket 00-0043, Final Order, January 23, 2001, at 6.

CUB sought injunctive relief, in the form of an Order requiring PESCO to cease and desist further dissemination of this offer in its present form; an Order requiring PESCO to cease and desist from accepting any customers under the terms and conditions of the offer; an Order requiring PESCO to notify all customer who have accepted the offer that the Commission has determined that the Agreement has misled customers; an Order terminating the Agreement at the end of its term (September, 2005) and requiring PESCO to re-solicit customers for renewal; an Order "warning" PESCO that further violations of the PUA and certain riders will be considered to be "repeat violations" and may warrant revocation of its certificate of its service authority; an Order allowing customers to terminate the Agreement without penalty; and, for customers choosing to remain on the Agreement, an Order requiring PESCO to provide gas at \$0.62 per therm through September 2005. CUB additionally sought an Order penalizing PESCO \$100 for each customer it solicited, up to \$1 million.¹ (CUB Am. Complaint at 12).

II. The Motion to Dismiss

On October 16, 2003, the ALJ denied a Motion to Dismiss filed by PESCO. In so ruling, the ALJ concluded that nothing in the Citizens Utility Board Act (the "CUB Act") prevented CUB from filing the instant Amended Complaint. The ALJ also determined that when stating that the price was disclosed, PESCO did not address the facts alleged by CUB, which were that, because there are so many ways for PESCO to change the stated price of \$.62 per therm, disclosure of that price is less than meaningful.

The ALJ additionally ruled that PESCO erroneously contended that CUB's citations to the Consumer Fraud Act were an attempt to enforce that Act, as CUB cited the Consumer Fraud Act by way of analogy to the AGS Act. Also, PESCO's argument that this Commission does not have jurisdiction to regulate the terms and conditions of its services missed the tenor of CUB's allegations, which concerns the propriety of

¹ In an oral ruling made on October 6, 2003, the ALJ ruled that Section 120 of the AGS Act does not allow this Commission to issue the temporary injunctive relief that CUB requested in its Amended Complaint, as the Act requires a hearing, with due notice of the charges, prior to issuance of a cease and desist order. (220 ILCS 5/19-120(c)). CUB's request for injunctive relief was therefore treated by the ALJ as a request for a permanent injunction.

PESCO's marketing. Section 115(f)(1) of the AGS Act prohibits deceptive marketing. (220 ILCS 5/19-115(f)(1)). In response to PESCO's argument that there was full disclosure of the "loopholes" in the Agreement because the Agreement was mailed with the letter, the ALJ reasoned that PESCO's disclosure of these provisions may not have been enough, as, the average consumer may not have been sufficiently, or adequately, informed as to what these provisions entitled PESCO to do, or not do, citing *Siegel v. the Levy Organization Development Co.*, 153 Ill. 2d 534, 543, 607 N.E.2d 194 (1992)).

III. The Affidavits and the Testimony Presented at the Hearing

At the evidentiary hearing conducted on November 21, 2003, Ms. Ito testified on behalf of PESCO and Ms. Howard testified on behalf of Commission Staff. Three affidavits authored by Ms. Ito, dated October 21, 2003, November 5, 2003, and November 14, 2003 were entered into evidence. Also, two affidavits, executed by Ms. Howard, dated November 6, 2003, and November 19, 2003, were entered into evidence.

A. Ms. Ito's Testimony

Ms. Ito averred that PESCO does not own, operate, manage or control any plant or equipment, or any part of any plant or equipment, for the transmission, delivery, or furnishing of heat, light, water or power, directly or indirectly, to or for the public. It also does not engage in the transmission or delivery of natural gas. Instead, PESCO contracts with third parties to transport gas or for city-gate purchases. The gas is delivered to the customer by the delivering utility (*i.e.*, Nicor) pursuant to tariffs filed by the delivering utility with this Commission. (PESCO Ex. 1 at 5).

PESCO marketed its offer in the territories of Northern Illinois Gas Company ("Nicor") and North Shore Gas Company ("North Shore"). Also, some Peoples Gas customers enrolled in the offer. Ms. Ito stated that PESCO participates in the Nicor Customer Select program, which allows Nicor's smaller volume customers to choose an alternative supplier for gas. (Tr. 88-89).

PESCO initially limited its offer to the first 2,000 customers because it had secured a supply of gas which, it estimated, would be sufficient to service only that number of customers. Before marketing a fixed-price offer, PESCO contracts with suppliers for enough gas to support the offer. After mailing the offer, PESCO secured an additional supply of gas, which allowed it to service additional customers at the same price and term as the original offer. (PESCO Ex. 2 at 2).

According to Ms. Ito, PESCO must assess a termination charge to a customer because, in order for PESCO to guarantee a fixed price to customers for an extended term, PESCO must make firm contractual commitments for supply. Thus, if a customer terminates before September, 2005, PESCO will still be required, pursuant to contracts with its suppliers, to pay for that customer's gas. (*Id.* at 3-4).

To enroll in the offer, a customer can complete a card that is attached to it, or call a provided toll-free number. To enroll by returning the card, a customer is required to sign the card, verifying that: "I have read and agree to the terms and conditions of the . . . Agreement." If a customer enrolls by phone, his or her phone conversation is recorded and there is a verification of the transaction, in which, a customer verifies account information, agrees to take service from PESCO and consents to the term of the Agreement, as well as pricing and the rescission provision. PESCO then sends a confirmation letter to this customer and a copy of the Agreement. (*Id.* at 2-3).

When a customer agrees to receive gas from PESCO, a verification is performed. At that time, a customer is read PESCO's disclaimer, informing that customer that PESCO is not the same company as Peoples Gas; that the rates of non-utility gas suppliers like Peoples Energy Services are not regulated by the Illinois Commerce Commission; and that the consumer need not buy products or services from Peoples Energy Services in order to receive the same quality service from Peoples Gas. When a customer accepts an offer by telephone and the acceptance is voice verified, PESCO sends the customer a confirmation letter and a copy of the Agreement. That customer also has three business days from receipt of confirmation letter to rescind the Agreement, without penalty. (PESCO Ex. 2 at 1-2).

Inbound calls to the toll-free phone number were answered by PESCO telemarketers using the script attached to the Amendment to the Amended Complaint. PESCO telemarketers also made outbound calls, using the same script, save the salutation, to some of the customers who received the offer letter and Agreement. PESCO only made outbound calls to persons to whom it had previously sent the offer letter and the Agreement. However, PESCO personnel did not know whether the persons solicited by telephone had actually read the Agreement. (Tr. 70). PESCO also trained its telemarketers as to the nature of the offer, so that these telemarketers would be able to answer consumer questions. (PESCO Ex. 2 at 1-2). In addition to customers who receive the offer, some customers called PESCO and requested service. (*Id.* at 3).

Ms. Ito's affidavit of November 14, 2003 stated that PESCO will send its customers a form letter, (which was attached to the affidavit) which explained certain terms in the Agreement and which allowed customers to terminate the Agreement for a certain period of time, and incur no contractual penalty. (PESCO Ex. 3 at 2). The form letter attached to Ms. Ito's affidavit was never sent by PESCO to its customers. (Tr. 60, 63). PESCO personnel did not send this letter out because Staff voiced concerns about the draft. (Tr. 91-92).

Effective October 10, 2003, PESCO will not market the offer and it will not enroll a customer in the offer. Effective November 6, 2003, PESCO will reject any written acceptance of the offer. (PESCO Ex. 3 at 2). Ms. Ito also stated that regardless of changes in the wholesale market, customers who are enrolled in the offer will receive gas at a fixed price of \$.62 per therm through the life of the offer. (PESCO Ex. 1 at 4). If PESCO were to make a future offer with a limited size or availability, PESCO

personnel would be willing to file the terms and conditions of the offering, including all limitations, with the Commission prior to making the filing. (PESCO Ex. 2. at 5).

Currently, PESCO uses the utility single-bill option (one bill reflecting the delivering utility's charges and that of PESCO). It anticipates continuing this option through the life of the offer; thus, PESCO personnel considers the bill for gas due on the date specified on the delivering utility's bill, not the date provided in paragraph 5 of the Agreement. (PESCO Ex. 1 at 5).

Ms. Ito stated that she could not envision any circumstance in which the stated price of \$.62 per therm would change. (Tr. 91). She also could not think of a *force majeure* situation that would change that price. (*Id.* at 92). She acknowledged that PESCO's *force majeure* clause excuses PESCO from performance due to many acts in addition to unforeseeable acts, such as those caused by God, nature and government, but stated that she was not testifying as to the legal interpretation of the language. (Tr. 93-94).

Ms. Ito explained her understanding of what some of the cost-pass-through charges were. An aggregating balancing charge is a charge imposed by the delivering utility to recover its cost of balancing an alternative gas supplier-consumer's account. This charge is filed by the delivering utility with the Commission every month. (Tr. 80-81). A storage service cost recovery charge is the recovery of the cost of maintaining storage on Nicor's system. This cost too, varies from month to month. (Tr. 81-82). A transition charge is imposed by Nicor; it results from the transition from regulated to non-regulated pipelines. (Tr. 83). Someone living in the Nicor territory will incur an aggregator balancing service charge, an account charge, a storage service cost recovery charge and a transition surcharge. (Tr. 74-75). Someone living in the North Shore territory will incur an aggregation balancing gas charge and an account charge. The storage service cost recovery charge, the balancing service charge and the transition charges are per therm charges. (Tr. 75-76). When PESCO refers to total pass through charges, it means all of the applicable previously-mention charges, not just the balancing charge. (*Id.*).

B. The Testimony of Ms. Howard

Ms. Howard opined that confusing and misleading marketing materials reduces the likelihood that a potential customer will make an informed choice. According to Ms. Howard, this type of marketing increases consumer dissatisfaction, which undermines consumer confidence, as well as the development of natural gas choice programs in Illinois. (Staff Ex. 1.0 at 2). Also, name recognition is a powerful tool. The logo PESCO uses, according to Staff, is the Peoples Energy Services logo, the very same logo used by Peoples Gas, a regulated company. Ms. Howard averred, essentially, that PESCO should have placed an affiliated interest disclaimer in the offer letter, not just in the Agreement. (*Id.* at 3-4).

Ms. Howard stated that, with regard to price, single-billing and payment options, the Agreement seemingly contradicts the averments in the offer letter. While the offer letter advertises that payment options are available, the Agreement does not mention payment options. (*Id.* at 4). Similarly, the offer letter advertises the availability of a "fixed price plan" that is not defined in the Agreement. (Staff Ex. 2.0.at 3).

With respect to price, while the offer letter states that the price of gas offered is "62 cents per therm for all the gas you can use," in fact, Ms. Howard opined, the Agreement states that the price has three components, \$.62 per therm, cost-pass-through charges and a monthly administrative fee. Ms. Howard concluded that the price of gas, in fact, is the total of these three components, not \$.62 per therm. (*Id.* at 5).

Ms. Howard is especially troubled by the cost-pass-through charges, as these charges are not explained in the Agreement. She opined that, if these charges are utility charges to the supplier and the supplier is choosing to pass these charges on to consumers, PESCO should fully disclose these charges as part of the offer price. Also, Ms. Howard is of the opinion that the aggregating balancing fee, which is based on a per therm consumption and which, varies each month, should have been included in the \$.62 per therm price. (*Id.* at 5-6).

With regard to consumer termination of the Agreement, Ms. Howard averred, essentially, that because the fee for early termination by a consumer could be substantial, it is a material term that must be disclosed in the offer letter. Also, the Agreement does not provide a consumer with enough information to determine how much a consumer would pay for early termination of the Agreement. (*Id.* at 6-7).

Ms. Howard additionally opined that, pursuant to Section 19-115 of the AGS Act, PESCO should be required, when, or if, it markets an offering of limited size or availability, to submit the offer, including all of the applicable limitations, to the Commission's Consumer Services Division, prior to making the offering available to consumers. (Staff Ex. 1.0 at 9).

Ms. Howard also recommended that PESCO describe all of the charges in its offer, including the aggregation balancing charge and others imposed by the delivering utility. (Tr. 105-106). She opined that PESCO's mailings to customers regarding the offer should state what charges are fixed and what charges are assessed on a per therm basis. (Tr. 107). She also stated that billing disputes with alternative gas suppliers such as PESCO are entertained at the Commission. (Tr. 108-09).

IV. PESCO's Subsequent Mailing

Subsequent to the evidentiary hearing, CUB moved to reopen the record to include certain tariffs, to which, it referred in the course of this proceeding. PESCO moved to reopen the record to include a letter it mailed to all of the affected customers on December 11, 2003, subsequent to the evidentiary hearing. These motions were granted on January 5, 2004. On January 9, 2004, a short evidentiary hearing

convened, and these documents, PESCO Ex. 4, and CUB Ex. 1, were admitted into evidence on January 9, 2004. The record was again marked "Heard and Taken" on January 9, 2004.

The December 11, 2003 letter refers to three form letters that PESCO developed -- one for each utility service territory. With respect to charges, each letter included the charges applicable to the utility in whose service territory the customer resided. The letter PESCO sent on December 11, 2003, sets forth the total amounts charged, *to wit*, \$.62 per therm for natural gas, a \$2.95 monthly administrative fee, and the applicable utility cost-past-through charges. The account charge differs among the utilities and each letter included the charge applicable to the customer's utility (\$.62 per month for Nicor Gas, \$.77 for North Shore and \$.55 for Peoples Gas). The balancing charge varies from month to month and the name of this charge and the amount differ among the utilities. For Peoples Gas, the aggregation balancing gas charge has ranged from \$.0239 to \$.0603 per therm during the past twelve months and, for North Shore, this charge has ranged from \$.0364 to \$.0695 per therm during this period. According to the December 11, 2003 letter applicable to Nicor Gas, the total of the aggregator balancing service charge and storage service cost recovery charge ranged over the past twelve months from \$.016 to \$.0213 per therm. (PESCO Ex. 4).

The December 11, 2003, letter also states that a customer will receive one bill from the delivering utility, which includes both delivery charges and PESCO charges. It explains that payment is due within 21 days, unless that customer has made other arrangements with the corresponding delivering utility. (*Id.*).

This letter further explains that PESCO will send a letter with a new price and time period at least 60 days prior to the end of the Agreement's two-year term. It also states that a customer can choose to decline the new offer before it becomes effective. (*Id.*).

The December 11, 2003, letter allows PESCO customers to cancel the Agreement with no penalty by calling a toll-free number by December 31, 2003. It further advises customers that there is a cancellation fee which PESCO will impose after December 31, 2003, if a customer chooses to cancel service with PESCO. While this letter advises customers that this cancellation fee is \$.15 per therm of expected use remaining on the term of the Agreement, it does not state how the expected use remaining on the term of the Agreement is determined. (*Id.*).

Personnel at PESCO does not view the letters PESCO sent to its customers as a modification of the existing Agreement between PESCO and its customers; instead, it views such a document as a clarification of the Agreement. (Tr. 89). Approximately 11% of PESCO's customers opted to terminate their Agreements with PESCO after having received the December 11, 2003, letter. The record does not include the reason(s) customers gave, if any, for terminating their Agreements.

Analysis and Conclusions

The Applicable Legal Standards

Injunctive Relief

CUB sought injunctive relief. Normally, CUB would be required, when seeking injunctive relief, to plead and prove such items as irreparable harm. However, when seeking injunctive relief that is expressly provided for by statute, a plaintiff is not required to plead and prove such elements. (*Village of Riverdale v. Allied Waste Transportation*, 334 Ill. App. 3d 224, 228, 777 N.E.2d 684 (1st Dist. 2002)). The principle underlying this judicially-created exception to the requisites for injunctive relief is that harm to the public at large can be presumed from the statutory violation alone. (*Id.*). The AGS Act provides that the Commission shall have authority, after notice and hearing held on complaint or on the Commission's own motion, to order an alternative gas supplier to cease and desist, or correct, any violation of, or nonconformance with, Section 19-115 of the Act. (220 ILCS 5/19-120(c)). Therefore, if PESCO violated Section 19-115 of the Act, injunctive relief can be a proper means to remedy that violation, without a showing of the requisites for injunctive relief in the Illinois Code of Civil Procedure.

V. The AGS Act

The AGS Act confers jurisdiction on this Commission to entertain and dispose of any complaint against an alternative gas supplier alleging that the alternative gas supplier has violated, or is not in conformance with, any applicable provision of Section 19-115 of the Act. (220 ILCS 5/19-120(b)). Section 19-115(f) provides 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 conditions of the products or services.
- (2) Before any customer is switched from another supplier, the alternative gas supplier shall give the customer written information that adequately discloses, in plain language, the prices, terms, and conditions of the products and services being offered and sold to the customer.

(220 ILCS 5/19-115(f)(1) and (f)(2)). (Emphasis added). In order to prevail, a complainant is required to establish, by a preponderance of the evidence, that the respondent violated the Public Utilities Act. (*See, e.g., Walden v. GTE North*, 1999 Ill. PUC Lexis 698 *83 (1999)).

VI. Application of the Consumer Fraud Act

PESCO's Position

According to PESCO, no section of the AGS Act authorizes this Commission to consider the Consumer Fraud Act in connection with a complaint against an alternative gas supplier. Using the Consumer Fraud Act as a basis for construing Section 19-115 also fails, according to PESCO, because Commission precedent that has used the Consumer Fraud Act, by way of analogy, has focused on a "public utility" and on sections of the Public Utilities Act that are not applicable to alternative gas suppliers. Additionally, PESCO maintains that the Consumer Fraud Act is not suitable for application here, as it allows suits for to be initiated by the Illinois Attorney General, or, suits by private plaintiffs who have suffered actual damages. (PESCO Reply Brief at 3-4).

CUB's Position

CUB contends, essentially, that court determinations setting forth what constitutes deceptive marketing, in violation of the Consumer Fraud Act, can be useful, by way of analogy, when determining what conduct violates Section 19-115(f) of the Act.

Staff's Position

Staff took no position on this issue.

Analysis and Conclusions

The Consumer Fraud Act reflects the intention of the General Assembly to eliminate, to the greatest extent possible, deceptive or unfair business practices and provide appropriate relief to consumers. (*Perona v. Zurek*, 292 Ill. App. 3d 59, 65, 684 N.E.2d 859 (1st Dist. 1997)). The AGS Act, similarly, requires alternative gas suppliers to adequately disclose, and disclose in plain language, any prices, terms and conditions involved in the services in question. (220 ILCS 5/19-115(f)(1) and (2)). Clearly, the intent and purpose of the two laws is the same, to protect consumers from certain unscrupulous representations. Therefore, cases determining what actions violate the Consumer Fraud Act can be useful, by way of analogy, when there are parallel situations. We note that the AGS Act became effective in February, 2002. None of the parties cites cases that apply this recently-enacted body of law to enforcement of Section 19-115(f) of the AGS Act.

Moreover, PESCO itself acknowledges the usefulness of analogous situations in the context of the Consumer Fraud Act, as it freely cites cases interpreting that Act. (See, e.g., PESCO Reply Brief at 4-6). Furthermore, the procedural requisites of the Consumer Fraud Act have no application when viewing that Act by way of analogy here, as it is the substance of that Act that is analogous, not the procedural aspects.

Finally, PESCO made this very same argument on motion to dismiss, at which time, the ALJ determined that the Consumer Fraud Act could be applied by way of

analogy. PESCO makes no new argument on this issue and it does not explain how, or if, the ALJ's decision to apply the Consumer Fraud Act, by way of analogy, was wrong.

However, we are not deciding to enforce the Consumer Fraud Act here. The parties have established the applicability of the AGS Act and the parties have not contended that any given situation here is governed by the Consumer Fraud Act, but not the AGS Act.² Based on the arguments presented, we conclude that the matters here can be decided through application of the AGS Act.

VII. Whether Section 19-115(f) of the AGS Act is Unconstitutionally Vague

PESCO's Position

PESCO argues that the word "adequate" in Section 19-115(f) of the Act is not sufficient guidance because the statute does not indicate for what purpose the information must be adequate. Without a specified purpose or requirement to serve as an objective reference for application of the word "adequate," PESCO concludes that Section 19-115(f) simply allows for a subjective determination as to what actions comply with it. (PESCO Posttrial Brief at 20).

PESCO maintains that applying Section 19-115(f) in a subjective manner constitutes an impermissibly vague application of the statute, which violates its right to due process. Citing *International Society for Krishna Consciousness v. Rochford*, 585 F.2d 263, 270 (7th Cir. 1989) and *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982), PESCO contends that, to comport with due process, a statute must first give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. Also, vague laws may trap the innocent by not providing a fair warning.

PESCO urges this Commission to consider, when applying Section 19-115(f), the danger presented in lack of notice to potential offenders and with standardless enforcement of the statute. PESCO suggests that this Commission should interpret the statute to require proof that the offer did not provide sufficient information for a reasonable person to evaluate the service offering. (PESCO Posttrial Brief at 20-21).

CUB's Position

CUB took no position on this issue.

Staff's Position

² The Consumer Fraud Act could be applicable here though certain Nicor Riders, which are applicable to PESCO, as it participates in the Nicor Customer Select Program, and which require PESCO to adhere to all laws governing truth-in-advertising.

Staff contends that PESCO has engaged in “creative interpretation of the statute.” It cites the testimony of its witness, who concluded that PESCO’s offer did not disclose certain price components. (Staff Posttrial Brief at 1-2).

Analysis and Conclusions

We agree with PESCO that application of Section 19-115(f) should be on an objective basis. However, application of a statute that is broadly worded should not be confused with subjective application of the law. The two are not the same. (See, e.g., *Scott v. Association for Childbirth at Home*, 88 Ill. 2d 279, 288-91, 430 N.E.2d 1012 (1981), ruling that the Consumer Fraud Act, while containing imprecise language, was not unconstitutionally vague, because the words therein are sufficiently explicit to inform those who are subject to it, of the conduct on their part, to which, it applies, and concluding that therefore, application of this imprecise language must be done on a case-by-case basis.). Section 19-115 of the AGS Act contains broad language, which, in and of itself, is not constitutionally infirm.

Moreover, even if the wording in the statute were not broad, Section 19-115(f) of the AGS Act is a remedial statute. Therefore, we must give it a broad construction. (See, e.g., *Klebe v. Patel*, 247 Ill. App. 3d 474, 479, 616 N.E.2d 1018 (2nd Dist. 1993)). The plain meaning of the words “adequate” and “disclose,” in Section 19-115(f) of the AGS Act is the furnishing of information sufficient for a stated purpose. (See, e.g., PESCO Posttrial Brief, p. 20, citing *Black’s Law Dictionary* and *Webster’s Unabridged Dictionary*). The purpose for disclosure of sufficient information in marketing materials is to give a consumer the information therein in a manner sufficient so that this consumer may reasonably make a decision, based on the information provided, as to whether to purchase the service or product. This is true because marketing materials are proffered to induce a sale. Therefore, Section 19-115(f) of the AGS Act is not unconstitutionally vague.

Such a construction of Section 19-115(f), as applied to the facts at bar would include, but not be limited to, disclosure of the information provided, in plain English, that is understandable to the person of ordinary intelligence, and readily apparent (not hidden or buried). (See, e.g., *Siegel v. the Levy Organization Development Co.*, 153 Ill. 2d 534, 543, 607 N.E.2d 194 (1992), construing the Consumer Fraud Act). And, it would require accurate disclosure of material facts in marketing materials, that is, those facts, upon which, a buyer would reasonably be expected to rely, when making a decision whether to purchase the product. (See, e.g., *Perona v. Zurek*, 292 Ill. App. 3d 59, 65, 684 N.E.2d 859 (1st Dist. 1997)). Also, where an advertisement is subject to two interpretations, one of which, is false, a trier of fact is not bound to assume that the truthful interpretation will be impressed on the mind of a reader. (*Williams v. Bruno Appliance and Furniture Mart*, 69 Ill. 2d 219, 222, 379 N.E.2d 52 (1st Dist. 1978)). Also, it is the effect of the conduct that must be examined, not a party’s intent. (See, e.g., *Falcon Associates v. Cox*, 298 Ill. App. 3d 652, 662, 699 N.E.2d 203 (5th Dist. 1998)).

We are not requiring PESCO to disclose any particular fact. We are requiring PESCO, for reasons that will be discussed below, to divulge accurate information with regard to the material terms it divulges concerning the price, terms and conditions of its offer, in plain English, that is, set forth in language that is readily discernable to a person of ordinary intelligence. We are also requiring material terms to be in a place in marketing materials that is readily able to be gleaned from (not hidden in) the materials.

VIII. What Documents are at Issue

PESCO's Position

All customers, whether enrolling by mail or telephone, received at least one copy of the Agreement. According to PESCO, the Agreement, which was the backside of the offer letter, was an integral part of the offer. PESCO further avers that the Agreement clearly described the terms and conditions of the offer. In support, PESCO cites several cases construing the Consumer Fraud Act. (PESCO Reply Brief at 4-6).

PESCO argues that this Commission should look at both documents it sent to potential customers. It maintains that the letter and the Agreement "fully describe" the price, terms and conditions of that offer. PESCO concludes that the letter provides a brief description of the offer and the Agreement provides the complete terms and conditions of the offer presented in the letter, with such customary matters as the process for customers to raise disputes with the Company or the Commission, and the normal contractual provisions, such the choice of law provision. (PESCO Posttrial Brief at 6).

CUB's Position

CUB contends that offer letter misled consumers because there are terms in the Agreement that are not mentioned in the offer letter. According to CUB, the letter materially misleads consumers by failing to reveal the charges PESCO imposes, which includes charges in addition to \$.62 per therm for gas. (CUB Posttrial Brief at 7). Also, according to CUB, this offer came at a time when Peoples Gas was in the midst of a public campaign to educate consumers about high gas prices, and, at the same time, PESCO, a Peoples Gas affiliate, was soliciting customers to enroll in an offer that does not protect them as promised.³ (CUB Posttrial Brief at 11). CUB seeks an order requiring PESCO to charge for gas at a rate of \$.62 per therm. (*Id.* at 13-14).

CUB takes, essentially, a "totality of the circumstances" approach to PESCO's offer. According to CUB, the offer letter is a visceral, emotional plea to "**Protect yourself against rising Gas Costs--fix the price Now before Winter,**" (emphasis in original) while the backside of the offer letter (the Agreement) contains complex terms, legalese and the like, which, in some cases, contradicts that which is represented to be in the offer letter, and, in other cases, it is not easy to understand. (CUB Reply Brief at

³ CUB offered no evidence indicating that there was a corollary between Peoples Gas' public campaign and PESCO's offering.

3). Thus, according to CUB, inserting terms in the Agreement that are not readily understandable, because they are in jargon, or because they are "buried" in the Agreement, does not let PESCO "off the hook" for the representations made in the offer letter. Also, while PESCO contends that it only solicited by phone those individuals to whom it had already mailed the Agreement, CUB points out that PESCO personnel, in fact, did not know whether customers had actually read the Agreement when they received a telephone solicitation from PESCO. (Tr. 70; CUB Reply Brief at 4-7).

Staff's Position

According to Staff, it is the offer letter, not the Agreement that attracts consumers. Therefore, according to Staff, the "fine print" must be in the offer letter (See, e.g., Staff Ex. 1.0 at 4).

Analysis and Conclusions

It may appear, at the outset, that many of the arguments presented by CUB and Staff are now moot, as the letter PESCO sent on December 11, 2003, could appear to address those arguments. However, with regard to some of the terms of the offer, Ms. Ito testified that personnel at PESCO did not view any letter it sends to the customers who accepted the offer, which would necessarily include the letter sent on December 11, 2003, as a modification of the existing Agreement. Rather, PESCO personnel views this letter as a clarification of that Agreement. (Tr. 89). With the exception of the portion of the December 11, 2003, letter that allowed consumers to terminate the Agreement during the month of December without penalty, Ms. Ito's testimony indicates that PESCO personnel does not view the letter as a binding commitment on the part of PESCO.⁴ Thus, whether or not the letter mailed on December 11, 2003, modifies the original Agreement or merely provides a clarification, the end result is the same for PESCO's customers.

The terms of the Agreement and the letter sent with that Agreement, as clarified by the December 11, 2003, letter, and as clarified by Ms. Ito's statement that PESCO will not charge its customers more than \$.62 per therm for gas during the life of the Agreement, are the subject at issue.⁵ It must also be added that, as will be explained below, some issues, those concerning clarification of some terms, have become moot, in terms of requiring any corrective action, due to PESCO's issuance of the December 11, 2003, letter.

PESCO's argument is that because the Agreement was part of the mailing, the Agreement, as well as the offer letter, must be considered. The mailing consisted of one piece of paper, with the letter on one side and the Agreement on the other. As PESCO points out, many routine "legal details" are in the Agreement, such as the

⁴ Ms. Ito acknowledged that allowing customers to terminate the Agreement, at no charge, modified the Agreement. ((PESCO Ex. 1 at 2)

⁵ Ms. Ito also stated, under oath, that PESCO will not charge its consumers more than \$.62 per therm during the life of the offer (September 2005). (PESCO Ex. 1 at 3).

choice of law provision, and, an “adequate disclosure” of the terms of that offer in the letter need not include these routine contractual items. PESCO’s argument parallels the case law regarding the Consumer Fraud Act, which requires disclosure of material terms, which are, those facts, upon which, a consumer would reasonably be expected to rely, when making a decision to purchase the product. (*Perona v. Zurek*, 292 Ill. App. 3d 59, 65, 684 N.E.2d 859 (1st Dist. 1997)).

We disagree with Staff that all terms, especially, routine contractual provisions, must be in the offer letter, as well as in the Agreement. Both the offer letter and the Agreement were part of PESCO’s marketing materials. Moreover, nothing prohibits PESCO from further clarifying or defining what is in the offer letter in the Agreement, with the caveat that provisions that are in technical terms, which are not readily discernable to the average person, do not sufficiently advise that person as to what is being disclaimed. (*Siegel v. The Levy Organization*, 153 Ill. 2d 534, 544, 607 N.E.2d 194 (1992)). Also, any further clarification must not be “hidden” in those materials. (*Id.*).

When taken *in toto*, namely, the Agreement, the offer letter and the December 11, 2003 letter, there is “adequate disclosure” of material provisions regarding the prices, terms and conditions of the offer PESCO provides and the marketing materials comply with the AGS Act.

IX. Billing Options and Payment Options

The offer letter states:

Don’t miss your chance to sign up for this great opportunity and rest easy for the months to come. With Peoples Energy Services, you will enjoy a single monthly bill and many payment options.

(Answer to Am. Complaint, Attachments). The Agreement does not mention payment options. As for PESCO’s billing options, the Agreement states: “Company may elect to consolidate utility bills with Company charges on a single bill. Company may discontinue consolidated billing service on reasonable notice.” (*Id.*, Attachments, Agreement). However, the December 11, 2003, letter advises:

You will receive one bill from the utility, which includes the above Peoples Energy Services’ charges and your utility delivery charges pursuant to the Agreement. Payment for all charges is due in 21 days, unless you have made other arrangements . . . If Peoples Energy Services cannot continue including its charges on the utility bill, we will send a separate bill for our charges. In that case, your payment will be due in 10 days. We do not anticipate that this will happen.

You have multiple payment options available to you, including electronic funds transfer, Internet bill payment, payment by mail and payment through a payment center. We also offer budget billing to levelize your monthly payment amount. Please contact (the delivering utility) or us for more details.

(PESCO Ex. 4).

CUB's Position

CUB took no position on the payment option issue. With regard to notification of when payment is due, and how that differs from bills sent from a delivering utility, CUB points out that PESCO's payment requirements are very different from those of a regulated utility, citing 83 Ill. Adm. Code Sec. 280.90(c). CUB also argues that providing customers with such a little amount of time to pay their bills increases the likelihood that customers will incur late charges. (Am. Complaint at par. 23).

Staff's Position

Staff argues that while the letter promises single billing, the Agreement permits PESCO to discontinue single billing. And the many payment options mentioned in the letter are not mentioned in the Agreement. Thus, Staff concludes that it is not clear what the payment options are. (Staff Posttrial brief at 5).

PESCO's Position

Citing no legal or factual authority, PESCO opines that payment options are not terms or conditions of the offer. (PESCO Reply Brief at 11).

Analysis and Conclusions

PESCO mentioned payment options in the offer letter. Nowhere in the offer letter or in the Agreement is any mention of what those payment options are. The fact that PESCO mentioned payment options in the offer letter is some indicia that PESCO viewed payment options as important enough to induce potential customers to purchase its service. However, the above-cited language in the December 11, 2003 letter clarifies what the payment options are for a consumer. In the December 11, 2003, letter, PESCO also advised its customers as to the fact that their bills could be due within ten days, instead of 21 days, which are, the billing options. The December 11, 2003, letter advises customers of those facts needed when deciding whether to purchase the product offered by PESCO. We find that the circumstances, *in toto*, establish compliance with the AGS Act.

X. The Price of Gas

The offer letter tells consumers that they will receive gas from PESCO at \$.62 per therm. The Agreement provides that customers will pay for gas at \$.62 per therm and also pay all charges assessed or collected by on a cost-past-through basis and a monthly administrative fee of \$2.95. (Answer to Amended Complaint, Attachments, Agreement, par. 4). In this Order, references to the December 11, 2003 letter that PESCO sent to customers who had accepted the offer at issue in this proceeding means three form letters that PESCO developed -- one for each utility service territory. With respect to charges, each letter included the charges applicable to the utility in whose service territory the customer resided. The letter PESCO sent on December 11, 2003, sets forth the total amounts charged, *to wit*, \$.62 per therm for natural gas, a \$2.95 monthly administrative fee, and the applicable utility cost-past-through charges. The account charge differs among the utilities and each letter included the charge applicable to the customer's utility (\$.62 per month for Nicor Gas, \$.77 for North Shore and \$.55 for Peoples Gas). The balancing charge varies from month to month and the name of this charge and the amount differ among the utilities. For Peoples Gas, the aggregation balancing gas charge has ranged from \$.0239 to \$.0603 per therm during the past twelve months and, for North Shore, this charge has ranged from \$.0364 to \$.0695 per therm during this period. According to the December 11, 2003 letter applicable to Nicor Gas, the total of the aggregator balancing service charge and storage service cost recovery charge ranged over the past twelve months from \$.016 to \$.0213 per therm. (PESCO Ex. 4).

CUB's Position

CUB contends that the offer letter contradicts what is in the Agreement, as the offer letter states that PESCO will charge for gas \$.62 per therm and the Agreement provides that the charges are \$.62 per therm for gas, a monthly administrative fee of \$2.95 and unspecified cost-pass-through charges.

PESCO's Position

PESCO points to the fact that the existence of all three price components are set forth in the Agreement. It opines that the pricing information that a customer needs to evaluate, to determine whether PESCO's product is competitive with gas offered by other companies, is fully disclosed. (PESCO's Posttrial brief at 7). According to PESCO, Staff does not state why distinguishing between utility charges to a consumer and utility charges to a supplier is relevant to the adequacy of the disclosure of these charges. PESCO maintains that these charges are utility charges and they are represented as such in the Agreement. (PESCO Reply Brief at 13).

PESCO further contends that the existence of the cost-pass-through charges is clearly stated in paragraph 4 of the Agreement. PESCO avers that it would not be possible to explain, in plain English, what the cost-pass-through charges are, and it would not be possible to state accurately what those charges will be, as some of these charges are readjusted more than once a year. Also, because some of these charges

are assessed on a flat rate, converting these charges to a per-therm basis could be misleading and confusing. (PESCO Posttrial Brief at 9-10).

Staff's Position

Staff looked to the offer letter and states that, while the letter states that customers will receive gas at a fixed price of \$.62 per therm, no other price is mentioned in that letter. In Ms. Howard's opinion, including the Agreement in the offer does not relieve PESCO of its responsibility to provide full disclosure of all pricing terms and conditions in the letter, as, according to Ms. Howard, a sale is made by virtue of the letter. (Staff Posttrial brief at 5).

Furthermore, according to Staff, PESCO did not disclose the price of gas, as, the true cost to the consumer is \$.62 per therm of gas consumed, cost-pass-through charges and the monthly administrative fee. Based on the limited information PESCO provided in the offer letter and in the Agreement, Staff surmised that it is not possible to determine how much a consumer will actually pay. (*Id.* at 5-6).

Staff especially takes issue with the cost-pass-through charges. According to Staff, it is not possible, from the information provided in the Agreement, to determine whether these are utility charges to the consumer, or, are utility charges to the supplier. If these charges are one to the supplier, Staff opined that the supplier made a business decision to pass these charges on to the consumer, a fact that must be disclosed. Also, these charges, according to Staff, must be included in the price stated in the letter accompanying the Agreement. (*Id.*).

Analysis and Conclusions

The offer letter misled consumers, as it did not disclose those charges that were in addition to the \$.62 per therm for gas. While the Agreement advised consumers, in a somewhat easy-to-spot manner, of the monthly administrative fee, the amount of, or what are, the cost-pass-through charges were not explained anywhere in the offer letter or in the Agreement.

However, PESCO's issuance of the letter of December 11, 2003, adequately explained these charges. Therefore, there is no need to issue an order requiring PESCO to disclose the actual charges.

PESCO argues, essentially, that because Ms. Ito stated that customers will not receive a new pricing notice during the term of the Agreement, customers will not be harmed by the provision in the Agreement that allows PESCO to change the price of gas. PESCO is correct that the December 11, 2003, letter and Ms Ito's averment, under oath rectify the deficiencies in its initial offer letter and Agreement.

XI. Termination

The Force Majeure Clause

Generally, a *force majeure* clause excuses a party from performing its contractual duties when that party becomes unable to perform due to an unforeseen event, such as an act of God, or, a man-made catastrophe, such as war, or a burst water main. (See, e.g., *Kahara Bodas Co. v. Perusahaan Pertambangan*, 335 F.3d 357, 360 (5th Cir. 2003), where a *force majeure* clause in a contract for construction in Indonesia was implemented after the President of Indonesia issued a decree suspending the construction project.). Paragraph 6 of the Agreement provides as follows:

Force Majeure. The occurrence of an event of force majeure will excuse either party, upon notice to the other party, from performing its obligations to the other for the duration of such event. Force Majeure will mean any even beyond the reasonable control of the non-performing party and that (*sic.*) could not be remedied by the exercise of due diligence. Force Majeure does not excuse Client from making payment when due.

(Answer to Amended Complaint, Attachments, Agreement, par. 6).

CUB's Position

By using such broad language in the *force majeure* clause, CUB surmises that PESCO has allowed itself to cancel the Agreement, if the price of gas increases. Citing *Northern Indiana Public Service Co. v. Carbon County Co.*, 799 F.2d 265, 275 (7th Cir. 1986), CUB maintains that a *force majeure* clause interpreted in a manner that excuses a party from consequences he or she expressly assumed would nullify a central term of the contract. (CUB Posttrial Brief at 8).

PESCO's Position

PESCO acknowledges that some contracts have a non-exclusive lists of events which include such items as acts of God, in their *force majeure* clauses. It contends, however, that such clauses are interpreted within the context of the parties' bargain. PESCO avers that a *force majeure* clause is not intended to buffer a party against the normal risks of a contract, and, the normal risk of a fixed-price contract is that the market price will change. (PESCO Posttrial Brief at 12-13). It concludes, essentially, that its definition does not expand the applicability of its *force majeure* clause beyond events that would be considered by the courts to be *force majeure*. PESCO also concludes that its *force majeure* clause is clearly disclosed and it is reasonable. (*Id.* at 13).

Staff's Position

Staff took no position on this issue.

Analysis and Conclusions

PESCO adequately disclosed the *force majeure* provision in the Agreement. In the context of a simple, one-page agreement, the Commission finds that an abbreviated definition of force majeure is sufficient. As PESCO explained, such a provision cannot be interpreted to give PESCO 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, and the provision is acceptable.

XII. The Termination Clause

Automatic Extensions

Paragraph 7 of the Agreement provides, in pertinent part:

Term, Termination & Termination Charges. THE INITIAL TERM OF THIS AGREEMENT WILL BEGIN ON THE DATE THAT COMPANY FIRST PROVIDES SERVICES HEREUNDER TO CLIENT AND END FIRST UTILITY METER READ ON OR AFTER SEPTEMBER 2005. THIS AGREEMENT WILL EXTEND AUTOMATICALLY FROM YEAR TO YEAR AFTER THE INITIAL TERM UNLESS CANCELLED BY EITHER PARTY ON 60 DAYS WRITTEN NOTICE PRIOR TO THE END OF THE INITIAL TERM OR PRIOR TO ANY EXTENSION.

(Answer to Am. Complaint, Attachments, Agreement, par. 7). The text is in bold type and capital letters.

CUB's Position

According to CUB, this provision allows PESCO to continue the Agreement beyond September, 2005, if PESCO decides not to cancel it. (CUB Posttrial Brief at 9-10). CUB seeks an order requiring PESCO to re-solicit customers at the end of the life of the Agreement. (CUB Posttrial Brief at 4).

PESCO's Position

PESCO points out that, pursuant to the Agreement, consumers may receive a pricing notice for any subsequent service to begin after the end of the two-year term of the Agreement. Also, consumers have an opportunity to reject the pricing notice. PESCO reasons that this provision does not force a consumer to receive service from PESCO after the end of the current term of the Agreement.

Staff's Position

Staff took no position on this issue.

Analysis and Conclusions

CUB's argument overlooks other portions of paragraph 7 of the Agreement, which require PESCO to submit a new pricing notice to a customer, if PESCO changes the price. Customers are free to reject a new pricing notice submitted to them at the end of the Agreement's term. Also, the letter PESCO sent on December 11, 2003, advises customers that they will receive a new pricing notice at least 60 days before the end of the term of the Agreement. The Agreement does not allow PESCO to automatically extend the Agreement. We find no violation of the AGS Act with respect to this issue.

XIII. PESCO's Ability to Change the Price of Gas

The Agreement provides, in pertinent part:

3. Client Obligations. Client will (a) purchase its full gas requirements at the price stated below or in any pricing notice as provided below; if, at any time, the price set forth below or in a pricing notice has expired or is otherwise no longer in effect, then Client will pay per therm consumed the price published in *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 . . .

(Answer to Amended Complaint, Attachments, Agreement, par. 3). (Emphasis in original).

Paragraph 7 of the Agreement provides, in pertinent part:

From time to time, Company may submit a new offer ("pricing notice") including a revised price and term, to Client, and, absent Client's written objection to that offer within 10 days of its receipt, the offer will be deemed accepted, any such offer need not be signed by Client and this Agreement will be deemed amended accordingly.

(*Id.* at par. 7).

CUB's Position

CUB contends that these provisions allow PESCO to change the price of the gas it provides, or, to return the customer to the delivering utility, absent a written objection to that offer within 10 days of its receipt. (See, Answer to Am. Complaint, Attachments, Agreement, par. 7). CUB interprets this clause to mean that PESCO can change the terms of the Agreement at any time and for any reason, and that change is binding, if a customer does not respond in writing within 10 days. This is despite PESCO's

representation that signing the Agreement will “lock in” a fixed price of \$.62 per therm until September, 2005. (CUB Posttrial Brief at 8-9).

PESCO's Position

PESCO maintains that pursuant to the Agreement, it cannot compel a customer to accept a price other than one the customer accepts. Also, a customer has a contractual right to terminate the Agreement upon 60 days notice. Thus, PESCO concludes that a customer need only object to the proposal of a change in the price of gas. (PESCO Posttrial Brief at 12-13). PESCO also argues that because the Agreement sets forth the process by which it may submit pricing notices to customers, it adequately disclosed to consumers the fact that it may change the price of gas from \$.62 per therm during the life of the Agreement. PESCO additionally argues that Ms. Ito explained that customers receiving fixed price service pursuant to the Offer will not receive any pricing notice proposing a price increase during the term of the Agreement. (*Id.* PESCO Ex. 1, at 4). PESCO also avers that Paragraph 3 of the Agreement is a default, to be used if no pricing notice is in place.

Staff's Position

Staff argues that these provisions allow PESCO to submit a new offer that is based on a variable rate. (Staff Posttrial Brief at 6-7).

Analysis and Conclusions

PESCO's argument ignores the tenor of CUB's contentions, and those of Staff, which are, that the Agreement does not really provide a “locked-in” fixed price of \$.62 per therm, because it allows PESCO to change the price, albeit, after it has submitted a new pricing notice to a customer and the customer has not objected. This contention has become moot, as Ms. Ito stated that PESCO will not change the price of gas during the term of the Agreement. (PESCO Ex. 1, at 4). Additionally, it is clear that the Agreement only obligates a customer to pay PESCO \$.62 per therm for gas. (See, Answer to Amended Complaint, Attachments, Agreement, par. 4). Moreover, even if PESCO were to submit a pricing notice during the initial two-year term, no customer would be compelled to accept that offer and could continue to receive gas at \$.62 per therm during the two-year term of the fixed price offer.

XIV. Returning a Consumer to the Delivering Utility Pursuant to Paragraph 7

Paragraph 7 also provides:

Company reserves the right not to commence service under this Agreement or to return Client to Client's prior utility service upon verbal notice, confirmed in writing, if, in Company's sole judgment, 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.

(Answer to Amended Complaint, Attachments, Agreement, par. 7).

CUB's Position

CUB contends, essentially, that this provision allows PESCO to escape its contractual obligations to provide gas through September, 2005. (Am. Complaint, par. 17).

PESCO's Position

According to PESCO, this provision is intended to protect it in the event of a material change in circumstance; it is not a means to terminate the Agreement based on any circumstances. PESCO also contends that this provision is adequately disclosed in the Agreement. (PESCO Posttrial Brief at 12).

Staff's Position

Staff took no position on this issue.

Analysis and Conclusions

The provision in question is adequately disclosed in the Agreement in plain language. Contrary to CUB's contentions, it does not give PESCO an unfettered right to return a customer to utility service. Only if there is both a changed circumstance and that circumstance adversely affects PESCO's ability to serve the customer can PESCO exercise its rights under the above-quoted provision. The provision is adequately disclosed and does not violate the AGS Act.

XV. Termination by a Customer pursuant to Paragraph 7

Paragraph 7 provides:

If Client terminates, or otherwise causes the termination of, this Agreement prior to the end of any 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.

(Answer to Amended Complaint, Attachments, Agreement, par. 7).

CUB's Position

CUB points to the fact that the early termination penalty imposed on a consumer is not in the offer letter. Also, according to CUB, the early termination penalty is hidden

in the Agreement in a manner that makes it unlikely that customers will see it or understand it. (CUB Posttrial Brief at 9).

PESCO's Position

PESCO argues that the termination charges are fully disclosed in Paragraph 7 of the Agreement. PESCO points out that a termination fee is necessary because, in order for it to guarantee a fixed price to customers for an extended term such as two years, it must make firm contractual commitments for supply. It concludes that this fee is adequately disclosed. (PESCO Posttrial Brief at 14).

Staff's Position

Staff opines that the Agreement does not state how the good-faith estimate would be calculated. Thus, it would be difficult for any potential customer to determine how much he or she would pay for early termination. Staff points out that if the early termination charge were not promptly paid, that fee would be subject to a late fee of 1.5 percent, plus credit and collection fees. Staff also posits that the offer letter does not mention the early termination fee. (Staff Posttrial Brief at 7).

Analysis and Conclusions

The existence of a termination fee is set forth in plain English, and the manner in which the amount of the fee would be calculated is adequately disclosed. It would be impractical for PESCO 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 (expected usage during the remainder of the term) so that consumers 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 Agreement. It also provides customers a means to challenge any calculation that PESCO 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 Agreement.

XVI. The Choice of Venue Clause

PESCO's Agreement requires any dissatisfied customer to file suit in the Circuit Court of Cook County. (Agreement, par. 10).

Staff's Position

Staff took no position on this issue.

CUB's Position

Cub took no position on this issue.

PESCO's Position

PESCO took no position on this issue.

Analysis and Conclusions

The choice of venue clause is clearly disclosed in the Agreement. Generally, the courts uphold choice of venue clauses unless they impose a hardship. PESCO's customers all reside in northern Illinois and selecting Cook County as the venue is a reasonable provision. The clause does not violate the AGS Act.

XVII. Customer Confusion between PESCO and Peoples Gas and Use of the Peoples Energy Corporation Logo

On both the offer letter and the letter PESCO sent to its customers on December 11, 2003, was the Peoples Energy logo, which is also used by Peoples Gas, a well-known, regulated, utility.

At the bottom of the Agreement, however, is the following statement:

Peoples Energy Services is not the same company as Peoples Gas. The rates of non-utility gas suppliers like Peoples Energy Services are not regulated by the Illinois Commerce Commission. You do not need to buy products or services from Peoples Energy Services in order to receive the same quality service from Peoples Gas.

(Answer to Am. Complaint, Attachments, Agreement). Also, when a potential customer phones PESCO's toll-free number, he or she is read the disclaimer above, if that customer agrees to take service from PESCO. (PESCO Ex. 2 at 1-2).

83 Ill Adm. Code Sec. 550.30(c) requires PESCO, as an affiliated interest of Peoples Gas, to include a legible disclaimer in every marketing or advertising material that states:

- (1) that the affiliated interest in competition with the ARGs is not the same company as the gas utility;
- (2) that the prices of the affiliated natural gas supplier in competition with the 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. Adm. Code Sec 550(c)).

CUB's Position

CUB contends that PESCO was required to orally state a disclaimer in telephone conversations with consumers prior to the time when those persons become PESCO customers. (Amendment to Amended Complaint, par. 5). CUB additionally argues that use of the Peoples Energy name and logo gives PESCO credibility it would not have, if the offer came from any other alternative gas supplier, as Peoples Gas is a reliable, regulated utility. CUB acknowledges that Commission rules allow utility affiliates to use a utility name and logo; CUB also acknowledges that the Agreement and PESCO's phone solicitation script for its telemarketers have disclaimers. However, it opines that PESCO is "trading in" on its name and reputation in a manner that misleads consumers. (CUB Posttrial Brief at 12). And, while PESCO contends that it only solicited by phone those individuals to whom it mailed the offer, CUB points out that PESCO personnel, in fact, does not know whether customers actually read the Agreement when they received a telephone solicitation from PESCO. (Tr. 70; CUB Reply Brief at 4-7).

According to CUB, the issue here is whether use of this logo created the illusion that the offer was made by a regulated utility. CUB points out that PESCO marketed this offer in the territory of North Shore. North Shore customers, it avers, are familiar with the Peoples Energy logo. (CUB Reply Brief at 7-9).

PESCO's Position

PESCO points out that it is a wholly-owned subsidiary of Peoples Energy Corporation, which is a public utility holding company. PESCO is also an affiliate of Peoples Gas, an Illinois public utility. It cites 83 Ill. Adm. Code Sec. 550.30(b), which expressly provides that affiliated interests in competition with regulated gas suppliers are not prohibited from using a corporate name or logo of a gas utility or gas utility holding company. (PESCO Posttrial Brief at 15-16).

PESCO avers that it has complied with 83 Ill. Adm. Code Sec. 550.30(c), as it included the required disclaimer in the Agreement and again in connection with a confirmation letter to consumers who still had an opportunity to cancel the Agreement without penalty. (PESCO Posttrial Brief at 16-17; PESCO Ex. 1, at par. 6). According to PESCO, it does not matter that the disclaimer appears on the Agreement and not on the offer letter because the Agreement was inseparable from the offer letter. (*Id.* at 17).

With regard to any oral disclaimer, PESCO avers that it only phoned those individuals to whom it had already mailed the offer, and thus had already received the

disclosure in the Agreement. Also, those customers who received the offer letter and Agreement had the option to phone PESCO regarding the offer; these individuals were given an oral disclaimer. The confirmation letter also contained the same disclosure. (*Id.* at 17).

Staff's Position

Staff points out that the font and its size of the logo used in the offer is similar to the Peoples Energy logo, which is strongly associated with PESCO's affiliate, Peoples Gas. Also, the stylized "O" in PESCO's logo is the same as that used by Peoples Gas. According to Staff, this creates customer confusion. Also, the offer letter does not have an affiliated interest disclaimer. Staff contends that 83 Ill. Adm. Code Sec. 550.30(c) requires PESCO to place this disclaimer on the offer letter, as well as the Agreement. (Staff Posttrial Brief at 3-4).

Analysis and Conclusions

The initial offering included a legible disclaimer, at the bottom of the Agreement, which disclosed that PESCO is not the same company as Peoples Gas, a statement that it was not regulated by the Commission, and a statement that a consumer need not buy products or services from Peoples Energy Services in order to receive the same quality service from Peoples Gas. This disclaimer complied with 83 Ill. Adm. Code Sec. 550.30(c). While Staff maintains that the disclaimer should have been in the offer letter, it was clearly a part of the offer, in a segregated, easy-to-spot portion of the Agreement, at the very bottom. PESCO's marketing materials included the Agreement and we decline to make PESCO recite that which is evident in one part of an offer in another. This is especially true in this case, as the Agreement is the backside of the offer letter.

However, PESCO did not voice a disclaimer in its oral marketing materials, unless the person marketed actually bought PESCO's product. While PESCO maintains that it only solicited (by phone) persons to whom it had previously mailed the Agreement, PESCO personnel did know whether the persons solicited had ever read the Agreement. (Tr. 70). PESCO is required, in the future, to include a disclaimer in any marketing materials, at the point of marketing, not at the point of sale. Customers must know, when marketed, with whom they are dealing. Otherwise, the purpose and intent of 83 Ill. Adm. Code 550.30(c) is circumvented.

XVIII. Stating that the Offer was Limited to the First 2,000 Customers

The offer letter stated that the offer was available to the first 2,000 customers. Subsequently, apparently, a spokesperson for PESCO announced that the offer may be available to more customers. (See, Answer to Am, Complaint, Attachments).

CUB's Position

According to CUB, by warning customers that the offer is extremely limited, PESCO has created the impression that a consumer must act immediately. Also, CUB opines that this statement creates the likelihood of confusion and it misrepresents a material characteristic of the offer. (CUB Posttrial brief at 10).

PESCO's Position

PESCO avers that there was a sound reason why it limited the offer to the first 2,000 customers, it had only secured a supply of gas for 2,000 customers. Prior to making an offer, it contracts with suppliers for a sufficient supply in order to support any offer. PESCO additionally contends that subsequent to mailing the offer, it was able to secure more gas at the same price and for the same two year term. (PESCO Posttrial Brief at 18). From these facts, PESCO argues that it is unreasonable for CUB to "leap to the conclusion" that the limitation to 2,000 customers was imposed for an untoward reason. (PESCO Posttrial Brief at 19).

Staff's Position

Staff took no position on this issue.

Analysis and Conclusions

While the tenor of CUB's Amended Complaint was that limiting the offer to the first 2,000 customers tends to make consumers act without exercising sound judgment, (*i.e.*, without "shopping around") CUB did not present any evidence indicating that customers who enrolled in the program did so in a hasty manner. Moreover, PESCO presented evidence establishing that it had business reasons for limiting the offer, and, for reopening the offer after it was initially limited to the first 2,000 persons. None of the parties presented evidence indicating that the evidence PESCO presented on this issue was incorrect. Under the facts presented, CUB did not establish that this limitation constitutes an inadequate disclosure of a material fact, or, otherwise violated the law.

However, initially, the offer in question was limited to 2,000 persons. PESCO was required by statute to submit this limited offer to the Commission prior to marketing it to the public. (220 ILCS 5/19-115(g)). There is no evidence of record indicating that PESCO complied with this law. While PESCO has demonstrated that it has good reasons for limiting this offer, the record is devoid of any evidence establishing that PESCO was unable to comply with Section 19-115(g) of the AGS Act. PESCO shall cease and desist from further actions that violate Section 19-115(g) of the AGS Act.

XIX. PESCO's Subsequent Remedial Repairs and Remedies

Background

The term "subsequent remedial repairs" is "borrowed" herein from tort law, which has some similarity to the action at bar, since tort law involves an analysis of

wrongdoing to another and the harm it causes. A subsequent remedial repair is an action that repairs the condition that caused the tort action, but, it occurs after the accident occurred, such as the subsequent repair of a staircase, after the plaintiff in a personal injury action was injured as a result of traversing that staircase. (See, e.g., *Bargman v Economics Laboratories*, 181 Ill. App. 3d 1023, 1035-36, 537 N.E.2d 938 (1st Dist. 1989)). Generally, such evidence is inadmissible as proof proffered by a plaintiff of a defendant's liability. (*Bargman*, 181 Ill. App. 3d at 1035-36). In large part, the rationale for this rule is a matter of public policy; correction of unsafe conditions should not be deterred by the possibility that such an act will constitute an admission of liability, and, later carefulness does not necessarily imply prior neglect. (*Id.*).

PESCO's Position

PESCO argues, essentially, that since the commencement of this action, it has acted in good faith to clarify any inadequacy in the offer letter and Agreement. At the outset of litigation, it drafted a supplemental letter for distribution to customers to address Staff's concerns. It coordinated with Staff on several drafts of the supplemental letter and any delay in actually sending the letter, according to PESCO, was due to a desire to ensure that consumers receive one letter that satisfies all of Staff's recommendations, rather than sending them a series of letters that might cause confusion. (Tr. 47-51, 78; PESCO Posttrial Brief at 21-22).

Citing *Santanna Natural Gas Corp., Application for a Certificate of Service Authority*, No. 02-0441, Order dated November 7, 2002, PESCO argues that the Commission addressed Section 19-115(f) of the AGS Act in that docket, and this Commission did not impose a fine, even though Santanna's behavior was egregious. (PESCO Reply Brief at 12).

In response to arguments made by Staff that PESCO's marketing materials should be subject to Staff review and monitoring, PESCO avers that it is not opposed to working with the Commission's Consumer Services Division with respect to written materials that it sends to customers and scripts that service as the basis for marketing. However, PESCO voices several concerns with Staff's recommendations. First, the scope and operating of further monitoring is unclear. The timing also is unclear and a delay caused by Staff review could allow PESCO's competitors to react to market changes more quickly than PESCO. Also, PESCO avers that it is unclear what recourse it would have, if Staff were to find its marketing materials to be inadequate. If this Commission adopts Staff's recommendation regarding continued monitoring, PESCO urges that such adoption should include specific time limitations, especially for Staff responses and dispute resolution processes. (PESCO Posttrial Brief at 23-24; Reply brief at 14).

Staff's Position

Staff has made several recommendations seeking a Commission order requiring PESCO to work with the Consumer Services Division prior to marketing future offers.

Staff additionally opines that, in the future, PESCO should be required to submit its marketing materials to the Consumer Services Division prior to marketing an offer that has limitations. Staff points out that the AGS Act requires PESCO to do so. (See, e.g., Staff Posttrial Brief at 11; 220 ILCS 5/19-115(g)).

Staff is also of the opinion that PESCO should be held liable for any breach of the AGS Act that occurred in the offer letter, and the Agreement. Staff view any subsequent actions on the part of PESCO are irrelevant.

CUB's Position

In CUB's Complaint, CUB sought injunctive relief and an Order penalizing PESCO \$100 for each customer it solicited, up to \$1 million. CUB opines that by their very nature, corrective actions imply previous wrongdoing. Also, according to CUB, for purposes of determining whether PESCO has violated the law, the letter of December 11, 2003, is not relevant. CUB urges this Commission not to limit the penalties imposed on PESCO to its corrective actions. (CUB Reply Brief at 10-11).

Analysis and Conclusions

PESCO's citations to *Santanna Natural Gas Corp., Application for a Certificate of Service Authority*, No. 02-0441, are instructive. At issue in that docket was whether Santanna should be certificated, given the high volume of consumer complaints Santanna generated. The high volume of consumer complaints against Santanna evinced a lack of sufficient managerial resources, a showing of which, is required by statute, prior to certification. (*Santanna*, No. 02-0441, Order of November 7, 2002, at par. 24). Redress for what generated the consumer complaints was not pursued in *Santanna*. (See, e.g., *Id.* at par. 92, urging parties to pursue remedial actions in another pre-existing docket.)

CUB and Staff have taken the position that PESCO should be penalized as though it never sent the December 11, 2003 letter. Both parties vehemently argue that PESCO has violated the law.

The Commission disagrees. First and most importantly, for the reasons set forth above, the Commission has determined that, considered *in toto*, the marketing material that is the subject of CUB's complaint did not violate the AGS Act. Notably, unlike the situation in Santanna, there is no evidence of any customer complaint about inadequate disclosure or any other aspect of the offer. Consequently, there is no evidence of customer harm. Moreover, the record establishes that, throughout the course of this litigation, PESCO, while it disputed the merits of the CUB and Staff allegations, engaged, on a constant basis, to improve that which was set forth in the offer letter and

the Agreement. The December 11, 2003 letter clarified the offer in a manner that made most issues in this case moot and, significantly, gave customers a second opportunity to rescind the agreement. (The first opportunity was three business days after the customer's receipt of the agreement; this rescission right is required by the delivering utilities' tariffs.) Some customers (11%) chose to rescind the agreement. While there is no evidence of why they chose to do so, and the Commission can speculate on any number of possible reasons, any conceivable customer harm was remedied by this additional rescission right. No penalty is warranted.

With regard to Staff monitoring, what is required of PESCO in the future, should be evident, given the laws cited above. Further monitoring this offer that is the subject of this docket is not necessary, as PESCO has voluntarily agreed not to market it. Also, except, as is set forth herein regarding the clause in the Agreement concerning termination by a customer, and as is required by 220 ILCS 5/19-115(g), Staff monitoring of future marketing should not be necessary. However, PESCO is encouraged to solicit Staff input regarding its marketing on an informal basis.

XX. Findings and Ordering Paragraphs

- (1) Peoples Energy Services Corporation is an alternative gas supplier, as such, it is subject to this Commission's jurisdiction;
- (2) the Commission has jurisdiction over the parties and of the subject-matter herein;
- (3) the recitals of fact set forth in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;
- (4) Peoples Energy Services Corporation shall provide natural gas to its customers that are the subject of this docket at \$.62 per therm during the life of the offer that is the subject of this docket, which is, through September, 2005;
- (5) Peoples Energy Service Corporation shall cease and desist from all actions that violate 220 ILCS 5/19-115(f) and (g).

IT IS THEREFORE ORDERED that Peoples Energy Services Corporation shall comply with Findings (4) and (5) herein.

IT IS FURTHER ORDERED that, pursuant to the provisions of Section 16-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

ORDER DATED:	January 22, 2004.
BRIEFS ON EXCEPTION DUE:	January 30, 2004
REPLY BRIEFS ON EXCEPTION DUE:	February 6, 2004

Claudia Sainsot
Administrative Law Judge