STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

CITIZENS UTILITY BOARD	)	
	)	
Complaint requesting the ICC	)	
to order Nicor Solutions	)	Docket No. 04-0034
to cease and desist misleading	)	
marketing of gas offering.	)	

RESPONSE OF THE CITIZENS UTILITY BOARD
IN OPPOSITION TO
TO NICOR SOLUTIONS' MOTION TO DISMISS

Pursuant to Section 200.190 of the Illinois Commerce Commission's ("Commission") Rules of Practice (83 Ill. Admin. Code §200.190), The Citizens Utility Board ("CUB") hereby files it Response in Opposition to the Motion to Dismiss ("Motion") of Nicor Solutions, L.L.C. ("Nicor Solutions"). The Motion should be denied because, contrary to Nicor Solutions' arguments, the Commission does have the authority to regulate Nicor Solutions' deceptive and misleading marketing practices.

Background

On January 15, 2004, CUB filed a Verified Complaint against Nicor Solutions alleging that it had solicited customers in a deceptive and misleading manner. In response, Nicor Solutions filed a Verified Motion To Dismiss on February 10, 2004. CUB then filed a Motion for Leave To Amend Complaint Instanter and Add a Necessary Party, Northern Illinois Gas Company ("Nicor Gas"), on February 17, 2004. The Administrative Law Judge ("the ALJ") granted CUB's Motion for Leave To Amend Complaint Instanter and Add a Necessary Party on February 18, 2004. The ALJ also entered and continued Nicor Solutions' Motion to Dismiss. Subsequently, both Nicor Solutions and Nicor Gas filed Motions to Dismiss on March 3, 2004.

Legal Standard

Nicor Solutions faces significant legal hurdles in order to succeed on a Motion to Dismiss. The rules of the Illinois Commerce Commission incorporate the Code of Civil Procedure regarding motions to dismiss found at 735 ILCS 5/2-615. *See* 735 ILCS 5/1-108(b). In deciding a motion to dismiss, the court or agency must accept all facts pleaded as true and indulge all reasonable inferences in favor of the plaintiff. *Bd. of Educ. of the City of Chicago v. A,C and S, Inc.*, 131 Ill. 2d 428, 438 (1989); *Katz v. Belmont Nat'l Bank*, 112 Ill. 2d 64, 67 (1986). Pleadings "shall be liberally construed with a view to doing substantial justice between the parties." 735 ILCS 5/2-603. "To see if a cause of action has been stated the whole complaint must be considered, rather than taking a myopic view of a disconnected part." *A, C and S, Inc.*, 131 Ill. 2d at 438 (*quoting People ex rel. Scott v. College Hills Corp.*, 91 Ill. 2d 138, 145 (1982)). A cause of action will not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle plaintiffs to recover. *Charles Hester Enterprises v. Illinois Founders Ins. Co.*, 114 Ill. 2d 278, 286 (1986). Under a rule of pleading long established, CUB was not required to set out its evidence in its complaint. *Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 308 (1982). "To the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts." *Id.* (*quoting Bd. of Educ. v. Kankakee Fed. of Teachers Local No. 886*, 46 Ill. 2d 439, 446-47 (1970)). Therefore, CUB only had to allege ultimate facts within its Amended Complaint in order to survive a motion to dismiss.

Argument

I. The Commission Does Have Authority To Regulate the Deceptive and Misleading Marketing Practices of Nicor Solutions

The legislature has given the Commission plenary power to regulate public utilities. *See* 220 ILCS 5/4-101. The Supreme Court of Illinois long ago held that the "Public Utilities Act confers upon the Illinois Commerce Commission plenary power with respect to the supervision and regulation of public utilities, including the power to fix reasonable rates and charges for their services." *See People v. City of Chicago*, 349 Ill. 304, 346 (1932). *See also Abbott Laboratories, Inc. v. Ill. Commerce Comm'n.*, 289 Ill. App. 3d 705, 711 (1997). In addition to granting the Commission plenary power to regulate public utilities, the legislature has clearly expressed its intent to have the Commission protect consumers from deceptive and misleading marketing practices.

Sections 8-501 (granting the Commission power to correct unjust and unreasonable practices), 9-250 (granting the Commission power to correct unjust and unreasonable rates), and 19-120 (granting the Commission power to correct deceptive marketing practices by alternative gas suppliers) clearly show the legislature's intent to protect consumers from deceptive marketing practices. 220 ILCS 5/8-501, 9-250, and 19-120. Moreover, an express grant of power by the legislature to an administrative agency carries with it the grant of power to do all that is necessary to execute that power or duty. *See Lake County Bd. of Review v. Prop. Tax Appeal Bd. of the State of Illinois*, 119 Ill. 419, 427 (1988). As a result, the ALJ should not construe the Public Utilities Act ("the Act") so narrowly as to frustrate the legislature's objective of protecting consumers from deceptive marketing practices. When examining evidence of unjust and unreasonable conduct under the Act, the Commission has previously applied the standards of the Consumer Fraud Act. *See Citizens Utility Board v. Illinois Bell Tel. Co.*

(Ameritech Illinois), ICC Docket No. 00-0043 Final Order at 6 (Jan. 23, 2001) ("*Simplifive*"). Here, the Commission can find Nicor Solutions' deceptive and misleading marketing activities liable for violating the Act as either an action of a utility or as an action of an alternative gas supplier.

II. The Commission Should Deem Nicor Solutions To Be Acting as a Mere Instrumentality of Its Utility Affiliate, Nicor Gas, And Disregard Their Separate Existence

Nicor Solutions' deceptive and misleading marketing activities relating to its Winter Cap program make it a mere instrumentality of Nicor Gas. For this reason, the Commission should properly disregard its separate existence and deem it as acting as the utility to regulate their deceptive and misleading marketing activities.

While it is a well-established principle that a corporation is a separate and distinct legal entity from its shareholders, directors, and officers, and, generally, from other corporations with which it may be affiliated, courts will disregard the separate corporate identity of one corporation and treat it as the alter ego of another. *Main Bank of Chicago v. Baker*, 86 Ill. 2d 188, 204 (1981) Courts will do this when it can be shown that one corporation is "so controlled and its affairs so conducted that it is a mere instrumentality of another, and it must further appear that observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice." *Id*. at 205.

Disregarding the separate existence of two legal entities, or piercing the corporate veil, "is not limited to the parent subsidiary relationship; the separate corporate identities of corporations owned by the same parent will likewise be disregarded in the appropriate case." *Id*. (*citing C.M. Corp. v. Oberer Dev. Co.*, 631 F.2d 563, 539 (7th Cir. 1980)). Therefore, the Commission can disregard the separate existence of affiliated entities that are not in a parent

subsidiary relationship. Here, Nicor Solutions and Nicor Gas are affiliated subsidiaries of a common parent, Nicor Inc. *See* Nicor Inc. 2003 SEC Form 10-K/A. Nicor Solutions and Nicor Gas also share common directors and shareholders.

Under the standards laid out in *Main Bank*, the Commission should disregard the separate existences of Nicor Solutions and Nicor Gas for two reasons. First, Nicor Solutions' Winter Cap program is conducted in such a way that Nicor Solutions is acting as a mere instrumentality of Nicor Gas. Second, observing the fiction of separate existence would sanction the deceptive and misleading marketing conducted by Nicor Solutions that harms consumers.

a. Nicor Solutions Is a Mere Instrumentality of Nicor Gas

Nicor Solutions' Winter Cap program is conducted in such a way that Nicor Solutions is acting as a mere instrumentality of Nicor Gas, because if customers enroll in the Winter Cap program, Nicor Solutions will then cancel their existing Customer Select agreement. *See* CUB's Verified Amended Complaint ("the Amended Complaint") at ¶29. Nicor Solutions switches customers back to Nicor Gas for gas service. The solicitation form does not adequately disclose, in plain language, the fact that enrolling in the Winter Cap program means having to switch from an alternative gas supplier back to Nicor Gas for gas service. If Nicor Solutions were offering a truly independent billing service as it claims, it would have no reason to force customers to switch gas suppliers back to Nicor Gas as a condition of enrolling in the Winter Cap program.

Nicor Solutions' proper economic incentive, if it were maintaining an arm's length relationship with Nicor Gas, would be to offer the Winter Cap program to as many customers as possible, regardless of the identity of their gas supplier. The only reasonable inference the Commission can draw from Nicor Solutions' exclusive relationship with Nicor Gas is that Nicor Gas agreed to this arrangement and is benefiting from the Winter Cap program to the detriment

of customers of competing alternative gas suppliers. Therefore, Nicor Solutions is acting as the mere instrumentality of Nicor Gas. Illinois courts have looked to the failure to maintain arm's length relationships among related entities as a factor when determining whether piercing the corporate veil is proper. *See Logal v. Inland Steel Indus., Inc.*, 209 Ill. App. 3d 304, 309 (1991). As a result, the Commission can properly find both Nicor Solutions and Nicor Gas liable for violating the Act.

b. Not Disregarding the Separate Existence of Nicor Solutions from Nicor Gas Will Sanction a Fraud or Injustice

If the Commission fails to disregard the separate existence of Nicor Solutions from Nicor Gas, it will effectively sanction a fraud or injustice. While Nicor Solutions and Nicor Gas may be using some lawful means, such as bill inserts, collection services, and the Nicor name and logo, to market the Winter Cap program, they are using them toward unlawful purposes. The Commission must examine the totality of Nicor Solutions' and Nicor Gas' use of these means in conjunction with two key facts. First, customers cannot readily ascertain key terms and provisions about the Winter Cap program from the solicitation materials, and second, Nicor Solutions is switching Winter Cap customers back to Nicor Gas in a deceptive and misleading manner.

By failing to disclose material terms and conditions of the Winter Cap program, Nicor Solutions is engaging in deceptive and misleading marketing in violation of the Act. *See* Amended Complaint at ¶¶36-49 and *Simplifive* at 6. Customers cannot know what they are buying when they enroll in the Winter Cap program on the basis of the solicitation materials. *See* Attachment 1 to CUB's Original Complaint. Customers have no basis to judge how likely they are or not to earn credits against their gas bill in the event of high natural gas prices. *See* Amended Complaint at ¶¶45-47. Nor are they able to estimate accurately, on the basis of Nicor

Solutions' marketing materials, the magnitude of those potential credits. *See* Amended Complaint at ¶43.

Nicor Solutions is acting in concert with Nicor Gas, not only to market deceptively a billing service of dubious value, but also to cancel deceptively any Customer Select agreement a customer may have. In essence, Nicor Solutions is working with Nicor Gas to "slam," or switch without proper authorization, a customer's gas supplier. This practice confuses and harms customers. It also harms the nascent competition in Illinois' retail gas market; competing alternative gas suppliers will lose customers to the utility because of unfair means, instead of informed choices by customers about price and quality.

The legislature has already recognized this problem in the telecommunications market and banned the practice there. 220 ILCS 5/13-902 (prohibiting unauthorized changes of service providers). The Commission in *MCI Telecomm. Corp. v. Illinois Bell Tel. Co.*, referred to slamming, defined as "switching consumers' long-distance or other telecommunications service without their knowledge or consent," as an "illegal practice." ICC Docket Nos. 96-0075 & 96-0084 (cons.) Final Order at 21 (Apr. 3, 1996). The legislature also recognized the potential for such mischief in the newly competitive retail gas market when it enacted Section 19-115, which requires verifiable authorization and adequate disclosure, in plain language, of the prices, terms, and conditions of the products and services being offered and sold to the customer *before any customer is switched* from another supplier. 220 ILCS 5/19-115(c), (f).

If the Commission were to fail to disregard the separate existence of Nicor Solutions from Nicor Gas, it would lend its sanction to a fraud or injustice. Nicor Solutions' and Nicor Gas' deceptive and misleading marketing practices represent an injustice, and these practices harm customers and competition. For these reasons, the Commission should disregard the

fiction of separate existence and deem Nicor Solutions to be acting as one with its utility affiliate, Nicor Gas.

III. Alternatively, The Commission Should Regulate the Deceptive and Misleading Marketing Activities of Nicor Solutions As Those of an Alternative Gas Supplier

If the Commission does not disregard the separate existence of Nicor Solutions, then the Commission should regulate the deceptive and misleading marketing activities of Nicor Solutions as those of an alternative gas supplier. Nicor Solutions furnishes gas within the meaning of the Act. Therefore, the Commission should extend its jurisdiction over Nicor Solutions, as provided by Section 19-120 of the Act, and regulate Nicor Solutions' deceptive and misleading marketing practices.

Section 19-105 of the Act defines an alternative gas supplier ("AGS") as

> [E]very person, cooperative, corporation, municipal corporation, company, association, joint stock company or association, firm, partnership, individual or other entity . . . that offers gas for sale, lease or in exchange for other value received to one or more customers, or that *engages in the furnishing of gas to one or more customers*, and shall include affiliated interests of a gas utility, reseller, aggregators and marketers . . .

220 ILCS 5/19-105 (emphasis added). In interpreting this definition, it is well settled that the primary objective of a reviewing court or agency in construing the meaning of a statute is to ascertain and give effect to the intention of the legislature. *See Michigan Ave. Nat'l Bank v. County of Cook*, 191 Ill. 2d 493, 503-504 (2000). *See also People v. Manos*, 202 Ill. 2d 563, 570 (2002). All other rules of statutory construction are subordinate to this cardinal principle. *See Sylvester v. Indus. Comm'n.*, 197 Ill. 2d 225, 232 (2001).

The intent of the legislature in enacting Article XIX of the PUA is obvious. The legislature sought to open the retail gas market to competition from AGSs and to protect customers from deceptive marketing practices. *See generally In re Santanna Natural Gas Corp.*,

ICC Docket No. 02-0441 Final Order at ¶89 (Nov. 7, 2002) ("Full disclosure of all applicable prices, terms, and conditions is crucial in a market that only recently came to enjoy the benefits of competition.") and 220 ILCS 5/19-115. With that in mind, the Commission can interpret the statute's plain, ordinary, and popularly understood meaning. *See Union Elec. Co. v. Dep't of Revenue*, 136 Ill. 2d 385, 397 (1990). *See also Davis v. Toshiba Machine Co.*, 186 Ill. 2d 181, 184-85 (1999). When interpreting statutory language it should be afforded "the fullest, rather than the narrowest, possible meaning to which it is susceptible." *See Lake County Bd. of Review v. Prop. Tax Appeal Bd.*, 119 Ill. at 423. As discussed in the Amended Complaint, the key phrase from Section 19-105 is "furnishing of gas." Amended Complaint at ¶¶15-17. *Webster's New World Dictionary* defines "furnish" as "to supply, provide, or equip with whatever is necessary or useful . . . the provision of *all things requisite* for performing a function." 547 (3d College ed. 1988) (emphasis added).[1] Using this popular definition, "furnishing of gas" would clearly include more than the simple provision of gas commodity. Furnishing of gas must also include marketing, billing services, and customer support which are the types of services necessary, useful, and requisite for performing the function of supplying gas to a customer. Moreover, the Commission cannot overlook the fact that Nicor Solutions switches a customer's gas supplier to its affiliated utility, Nicor Gas, as a condition of enrolling in the Winter Cap program.

Alternatively, if the Commission decides that the meaning of "furnishing of gas" is ambiguous and susceptible to more than one equally reasonable interpretation, then it "may look to additional sources to determine the legislature's intent." *See Manos*, 202 Ill. 2d at 571. In doing so, the Commission must give reasonable meaning to each word, clause, and sentence, and

[1] The *Merriam-Webster On-line Dictionary* defines "furnish" as "to provide with what is needed . . . provision of any or all essentials for performing a function." <http://www.m-w.com> (last visited Mar. 17, 2004) (on-line material based upon *Merriam-Webster's Collegiate Dictionary, Tenth Edition*).

not render the words superfluous. *See Sylvester*, 197 Ill. 2d at 232. It is axiomatic that the legislature, in enacting a statute, meant for all of the language it drafted to have meaning. Indeed, the Commission itself stated "[a] court should avoid a construction that renders part of the statute superfluous or meaningless." *Midwest Generation Energy Services, LLC*, ICC Docket No. 02-0740 Order on Rehearing at 17 (June 26, 2003) (*citing Bonaguro v. County Officers Electoral Bd.*, 158 Ill. 2d. 391 (1994)). However, if the Commission adopts Nicor Solutions' narrow interpretation of "furnishing of gas," then the Commission would make those words merely duplicative of the rest of the definition contained in Section 19-105. 220 ILCS 5/19-105. This would render those words superfluous, which the Commission should not do. *Sylvester*, 197 Ill. 2d at 232.

"Legislative intent can be ascertained from a consideration of the entire Act, its nature, its object and the consequences that would result from construing it one way or the other." *See Fumarolo v. Chicago Bd. of Educ.*, 142 Ill. 2d 54, 96 (1990). Again, the legislature's intent in enacting the Alternative Gas Supplier Law is clear. It sought to open the retail gas market to competition and protect customers from deceptive marketing practices. *See generally In re Santanna Natural Gas Corp.*, ICC Docket No. 02-0441 Final Order at ¶89 (Nov. 7, 2002) and 220 ILCS 5/19-115. If the Commission adopted Nicor Solutions' interpretation of "furnishing of gas," then Nicor Solutions and others like it would be free to continue to market deceptively and slam customers back to their affiliated utilities. Such an interpretation would clearly be at odds with the legislature's intent in promoting competition and protecting customers. In construing a statute, the Commission must presume that the General Assembly, in its enactment of legislation, did not intend absurdity, inconvenience, or injustice. *See Michigan Ave. Nat'l. Bank*, 191 Ill. 2d at 504.

If, instead, the Commission adopted CUB's interpretation of "furnishing of gas," then it would be fulfilling the intent of the legislature by protecting customers and promoting competition. Contrary to Nicor Solutions' arguments, CUB's interpretation of "furnishing of gas" would not result in a software consulting firm, that developed a new billing service, becoming an alternative gas supplier. Nor would CUB's interpretation transform the United States Postal Service into an alternative gas supplier by simply mailing letters. Neither entity is required or essential for performing the function of supplying gas to a customer. The software consulting firm is supplying consulting services, while the Postal Service is providing mail services. The difference between them and Nicor Solutions is that Nicor Solutions' billing service, which promises protection from high gas prices, is clearly bound to the provision of gas service. The Commission must reject Nicor Solutions' narrow interpretation of an AGS because "[s]tatutes must be construed in the most beneficial way which their language will permit so as to prevent hardship or injustice, and to oppose prejudice to public interests." *Mulligan v. Joliet Regional Port District*, 123 Ill. 2d 303, 313 (1988).

Conclusion

The Commission should deny Nicor Solutions' Motion because, contrary to Nicor Solutions' arguments, the Commission does have the authority to regulate Nicor Solutions' deceptive and misleading marketing practices. The Commission should deem Nicor Solutions to be acting as a mere instrumentality of its utility affiliate, Nicor Gas, and disregard their separate existence to regulate Nicor Solutions' deceptive and misleading marketing practices. Alternatively, the Commission should regulate the deceptive and misleading marketing activities of Nicor Solutions as those of an alternative gas supplier. Doing so would obey the legislature's intent to protect customers and promote competition.

WHEREFORE, CUB respectfully requests that the Administrative Law Judge deny Nicor Solutions' Motion to Dismiss for the reasons set forth in this Response.

Respectfully Submitted,

Stephen Y. Wu
Legal Counsel
Citizens Utility Board
208 S. LaSalle St., Suite 1760
Chicago, IL 60604
(312) 263-4282 (phone)
(312) 263-4329 (fax)
swu@citizensutilitybaord.org

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