

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission)	
on Its Own Motion)	
)	Docket No. 01-0705
Northern Illinois Gas Company d/b/a Nicor Gas)	
Company)	
)	
Reconciliation of Revenues Collected under Gas)	
Adjustment Charges with Actual Costs Prudently)	
Incurred)	
)	
Illinois Commerce Commission)	
on Its Own Motion)	
)	Docket No. 02-0067
Northern Illinois Gas Company d/b/a Nicor Gas)	
Company)	
)	
Proceeding to Review Rider 4, Gas Cost Performance)	
Program, Pursuant to Section 9-244(c) of the Public)	
Utilities Act)	
)	
Illinois Commerce Commission)	
on Its Own Motion)	
)	Docket No. 02-0725
Northern Illinois Gas Company d/b/a Nicor Gas)	
Company)	
)	
Reconciliation of Revenues Collected under)	
Gas Adjustment Charges with Actual Costs)	
Prudently Incurred)	

**REPLY BRIEF OF NICOR GAS
IN SUPPORT OF MOTION TO EXCLUDE STEPHEN J. MATTSON
AS A WITNESS IN THIS PROCEEDINGS**

CUB’s response brief is notable more for what it omits than for what it says. Nowhere does CUB explain why the testimony of Nicor Gas’s former outside counsel, Stephen J. Mattson, Esq. (“Mattson”), is relevant in this proceeding at all—or, if so, why that testimony would be anything but needlessly cumulative. That is sufficient reason alone to exclude this testimony, even if Mattson had never acted as Nicor Gas’ lawyer. Neither does CUB dispute that, if Mattson does possess any arguably relevant information, it is subject to the attorney-client

privilege and work product doctrine (in fact, CUB's brief entirely fails to mention the work product privilege). And at no point does CUB dispute that, by placing Mattson on the stand, it is seeking access to such privileged information.

CUB's sole argument is that Nicor Gas somehow waived the attorney-client privilege as to unspecified (or all) knowledge Mattson may have acquired in his many years as the Company's outside lawyer due to the production of a PBR investigatory report by *another lawyer*, Scott Lassar (the "Lassar Report"), who was hired by the board of Nicor Gas's parent, Nicor, Inc. CUB argues that a waiver should be found simply because Lassar conducted a brief telephone interview of Mattson during the course of that investigation. This argument is legally and factually baseless. Without a shred of factual support, CUB simply asserts that Lassar relied on information from the Mattson interview in the preparation of the Lassar Report. CUB Resp. 4. CUB is wrong. The Lassar Report in no way references or relies upon Mattson's abbreviated telephone conversation with Lassar, which in any event was conducted in confidence between two lawyers. As Lassar states in his Affidavit submitted herewith (attached as Exhibit A), "Mr. Mattson did not provide any information upon which I relied in preparing either my Report or my testimony." Lassar Aff. ¶ 10.

To the extent that CUB attempts to cobble together a waiver theory for Mattson's confidential communications with Nicor Gas simply because Lassar's one-page summary of his limited telephone conversation with Mattson was eventually produced in these proceedings—along with all the other Lassar interview summaries—that must be rejected, too. Any "waiver" would be confined to the communications set out in that one-page memo, not the far-reaching inquiry that would inevitably result were Mattson forced to testify. Accordingly, Nicor Gas's motion to exclude Mattson as a witness in these proceedings should be granted: Mattson's

testimony has not been shown to have any relevance; to the extent that Mattson has any non-privileged information, his testimony would be duplicative of that of other witnesses with greater knowledge who are not lawyers; his testimony would inevitably intrude into privileged areas; and, at best, his appearance would waste time and force the Administrative Law Judges (“ALJs”) to navigate a minefield of privilege issues for no good reason.

I. **ARGUMENT**

A. CUB Has Failed To Demonstrate Any Legitimate Need For Mr. Mattson’s Testimony

In its response, CUB baldly asserts that “Mr. Mattson’s testimony is necessary to put forward its best case.” CUB Resp. 5. But CUB provides no factual support whatever for that statement—demonstrating that the very reason CUB wants Mattson to take the stand is so that, given his numerous years of experience as Nicor Gas’s lawyer, CUB can engage in a fishing expedition into privileged topics. Any such effort must be prohibited.

Indeed, despite pressing similar claims and theories, no other party (including Commission Staff, Cook County, and the Attorney General’s Office) has listed Mattson as a witness. CUB pretends that its being an outlier in this regard does not undermine the purported “need” for Mattson’s testimony. CUB Resp. 4. But if any other party considered Mattson’s testimony relevant, he would have been identified on their witness lists as well. Further weakening CUB’s claim of “relevance” is that, though thirteen Company witnesses have been deposed in this matter, no one—*not even CUB*—sought to depose Mattson. CUB’s belated and unjustified efforts to portray Mattson’s appearance as “necessary” to its case must therefore be rejected outright, regardless of any issues of privilege.

It is hornbook law that only relevant evidence may be admitted. *E.g.*, *Wiker v. Pieprzycka-Berkes*, 314 Ill. App. 3d 421, 427, 732 N.E.2d 92, 97 (1st Dist. 2000) (“All evidence must be relevant to be admissible.”). It is equally the case that relevant evidence may be excluded when it will interfere with the fair and efficient presentation of the trial. Needlessly cumulative evidence fits within that category. *Aguinaga v. City of Chicago*, 243 Ill. App. 3d 552, 573, 611 N.E.2d 1296, 1311 (1st Dist. 1993) (trial court may exclude evidence that is “merely cumulative”).

As Nicor Gas’s opening brief demonstrates, Mattson’s testimony would (at most) merely be cumulative and collateral with respect to Nicor Gas’s plans or strategies for the PBR Program, and is otherwise irrelevant. CUB has available to it Company witnesses who were *directly responsible* for administering the PBR Program, as well as hundreds of thousands of pages of documents relating to the creation and implementation of the Program. Nicor Gas Br. 3-4, 9. CUB can also question the author of the Report—Scott Lassar—about its contents. Thus, there is a sufficient, independent basis to preclude Mattson’s testimony even were it not privileged or, as CUB now contends, the privilege were waived. *See, e.g.*, *Aguinaga*, 243 Ill. App. 3d at 572, 611 N.E.2d at 1311 (trial court legitimately excluded testimony as irrelevant and duplicative of two other witnesses); *Yassin v. Certified Grocers of Ill., Inc.*, 150 Ill. App. 3d 1052, 1061, 502 N.E.2d 315, 323 (1st Dist. 1986) (plaintiff was properly limited to one company witness to avoid duplication of testimony); *Clemons v. Mechanical Devices Co.*, 292 Ill. App. 3d 242, 251, 684 N.E.2d 1344, 1350 (4th Dist. 1997) (“we hold that the court clearly abused its discretion by allowing in * * * testimony” that was “irrelevant”), *aff’d*, 184 Ill. 2d 328, 704 N.E.2d 403 (1998).

Perhaps most glaringly absent from CUB's brief is any explanation at all as to why Mattson's testimony is required, or has any probative value. Elsewhere, in a request for a subpoena to compel Mattson's appearance as a witness, CUB has claimed—again without any factual support—that Mattson made “statements” to Lassar “that contradict positions taken by Nicor witnesses.” CUB Verified Request for Issuance of Subpoena (filed Mar. 24, 2004), ¶ 2. CUB does not identify which of Mattson's “statements” it is referring to, who those “Nicor witnesses” may be, or how the “positions” are supposedly “contradictory.” CUB's silence on each of these points is telling. CUB is utterly unable to show that Mattson possesses relevant or material information, much less relevant or material information that is unavailable from other sources. That alone justifies rejecting CUB's request to call Mattson as an adverse witness. *See People v. Bolden*, 197 Ill. 2d 166, 184, 756 N.E.2d 812, 822 (2001) (testimony properly excluded where defendant made no showing as to its particular relevancy).

When examined, it is clear that the Mattson “statements” contained in the Lassar interview memo are—contrary to CUB's contention—consistent with the positions of Nicor Gas' witnesses, and utterly irrelevant to CUB's theories in this case. The one-page interview memo, attached hereto as Exhibit B, reflects that Mattson told Lassar that “[t]here was no discussion of using [LIFO gas] layers in regard to the PBR.” The absence of a discussion between Mattson and Nicor Gas regarding the utilization of the low-cost LIFO gas layers in the PBR is entirely consistent with the Company's position that it could and would beat the Benchmark without relying on the use of the low-cost LIFO gas. In any event, that Nicor Gas's outside counsel did not discuss using LIFO gas layers with the Company certainly provides no support for CUB's theory that the Company had such a strategy. Such “evidence” is irrelevant because it has no “tendency to make the existence of any fact that is of consequence to the determination of [this]

action more probable or less probable than it would be without [such] evidence.” *Bolden*, 197 Ill. 2d at 184, 756 N.E.2d at 822 (excluding testimony that failed to meet this standard of relevancy). *Accord Smith v. Silver Cross Hosp.*, 339 Ill. App. 3d 67, 76, 790 N.E.2d 77, 85 (1st Dist. 2003) (“Evidence is relevant if it tends to prove a fact in controversy or render a matter in issue more or less probable.”). The same is true of the interview memo’s other statements regarding Mattson’s lack of knowledge of other PBR issues. What Nicor Gas may, or may not, have told Mattson neither aids in understanding any of the issues in this case nor sheds any light on Nicor Gas’s creation and implementation of the PBR Program. *See, e.g., Illinois State Toll Highway Auth. v. Heritage Standard Bank & Trust Co.*, 250 Ill. App. 3d 665, 685, 619 N.E.2d 1321, 1334 (1st Dist. 1993) (evidence should have been excluded that did not “tend to prove the matter sought to be proved”), *aff’d*, 163 Ill. 2d 498, 645 N.E.2d 896 (1994). Such material is not only privileged, it is utterly irrelevant to the issues in this proceeding.

B. Nicor Gas Has Not Waived the Attorney-Client Privilege As To Its Communications With Mr. Mattson

Nicor Gas has never disputed the proposition that the attorney-client privilege has certain limits (*see* CUB Resp. 1-2), but there exists no “discretion to compel the disclosure of information that is privileged.” *Sterling Finance Mgmt., L.P. v. UBS PaineWebber, Inc.*, 336 Ill. App. 3d 442, 446, 782 N.E.2d 895, 898 (1st Dist. 2002). None of CUB’s three rationales for why Nicor Gas has purportedly waived the privileged nature of its communications with Mattson withstands the slightest legal or factual scrutiny. In fact, CUB fails to cite any authority that supports its position of waiver, and its opposition to Nicor Gas’s motion to exclude Mattson’s testimony should therefore be disregarded.

CUB first states that Nicor Gas waived the attorney-client privilege simply by allowing Mattson to be interviewed by Lassar, the lawyer hired by the Special Committee of Nicor, Inc.’s

Board to undertake an internal investigation of certain allegations concerning Nicor Gas. *See* Lassar Aff. ¶ 3. CUB is wrong. Mattson counseled Nicor Gas (as well as Nicor, Inc.) on various legal matters for many years. Nicor, Inc. is the 100% owner and corporate parent of Nicor Gas. Lassar Aff. ¶ 3 n.1. As such, Nicor Inc.’s coordination of an internal investigation involving its subsidiary cannot waive the privilege. Similarly, the fact that an attorney for Nicor Gas/Nicor, Inc. (Mattson) provides information to the Nicor, Inc. Board—or to another attorney acting as the Board’s agent (Lassar)—cannot waive the privilege. There is no waiver created by such interactions because no disclosure to a nonprivileged outsider has occurred. *See Caremark, Inc. v. Affiliated Computer Servs., Inc.*, 192 F.R.D. 263, 266-268 (N.D. Ill. 2000) (where consulting firm engaged counsel to review company contract, communications were privileged as to company subsidiary and parent); *Allianz Underwriters, Inc. v. Rusty Jones, Inc.*, No. 84 C 10860, 1986 WL 6950, at *3 (N.D. Ill. Jun. 12, 1986) (letter from president of parent to counsel for wholly-owned subsidiary retained privilege).

“[T]he Illinois attorney-client privilege protects communications between a non-employee agent and the corporation’s attorneys where the agent has express authority to coordinate [a] legal review.” *Caremark*, 192 F.R.D. at 264. Here, Lassar’s investigation was conducted as a confidential matter within the confines of the Nicor corporate enterprise, with nonpublic information supplied to him to be kept confidential. Lassar Aff. ¶ 4. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 120, 432 N.E.2d 250, 258 (1982) recognizes that the attorney-client privilege must be tailored to the “modern corporate realities” of how businesses operate and decisions are made, including permitting control group members to share legal advice and allowing “corporate boards to seek out counsel from those attorneys having * * * the requisite expertise” without fear of waiver, *Powell v. Western Ill. Elec. Coop.*, 180 Ill.

App. 3d 581, 589, 536 N.E.2d 231, 236 (4th Dist. 1989). *Accord Caremark*, 192 F.R.D. at 264; *Allianz*, 1986 WL 6950, at *1-2 (letter from one control group member to attorney was privileged, where copy was transmitted to another control group member). For that reason, the attorney-client privilege cannot be deemed to slip away simply because Mattson cooperated with the Nicor parent's corporate board. While the Lassar Report was ultimately released publicly, the fact remains that it nowhere mentions Mattson, and is not predicated on any information he provided during the investigation nor, more generally, on any legal counsel he provided to Nicor Gas. Lassar Aff. ¶¶ 9-10.

The scope of the information contained in the publicly-released Report also defeats CUB's second argument for vitiating the attorney-client privilege—because CUB proceeds on a wholly inaccurate version of the facts. CUB contends that waiver as to Mattson's privileged knowledge has occurred because “Lassar relied on the [Mattson] interview summary in the preparation of his Report and testimony” in this case. CUB Resp. 4. That assertion is false. Lassar at no time “acknowledged” (*id.* at 3) that his Report or testimony was premised on his interview with Mattson. As the attached Lassar Affidavit establishes, his Report and his pre-filed direct testimony *do not* include any information supplied by Mattson or otherwise gleaned from the telephone conversation between the two during the internal Nicor investigation. Lassar Aff. ¶¶ 9-10. The reason for that is apparent: Mattson's interview was inconsequential—he provided no relevant information.

The third instance of waiver claimed by CUB is that Lassar's one-page summary of his interview with Mattson was produced in these proceedings along with all the other interview summaries from the Lassar investigation. CUB's suggestion that by turning over the Mattson interview memo, Nicor Gas has in some manner surrendered the privilege as to all of its

confidential communications with Mattson is, again, misguided. The interview memo merely indicates that Mattson had no communications with Nicor about LIFO layers or other associated PBR matters. Mattson's *lack of communications* with his client as to certain matters does not waive the privilege as to Mattson's *confidential communications* with his client as to other matters. Moreover, any arguable waiver of privilege as to what are purely irrelevant and immaterial statements by Mattson (*see supra* pp. 4-6) does not justify the wholesale intrusion by CUB into Mattson's privileged knowledge in other areas. *See, e.g., Graco Children's Prods., Inc. v. Dressler, Goldsmith, Shore & Milnamow, Ltd.*, No. 95 C 1303, 1995 WL 360590, at *8 (N.D. Ill. Jun. 14, 1995) (waiver is confined to communications on the "same subject"); *In re Estate of Hoover*, 226 Ill. App. 3d 422, 431, 589 N.E.2d 899, 906 (1st Dist. 1992) ("while [plaintiff's former wife] had partially waived the attorney-client privilege as to the communications with [her lawyer] that she had disclosed, there was no blanket waiver as to the undisclosed communications"), *aff'd in part, vacated in part on other grounds*, 155 Ill. 2d 402, 615 N.E.2d 736 (1993).

If Mattson is ordered to appear, any line of inquiry will undoubtedly stray into such other areas of privilege. His exclusion is warranted to forestall that result. At a minimum, his appearance would be "totally incompatible with the efficient disposition of [the] litigation." *Consolidation Coal*, 89 Ill. 2d at 110, 432 N.E.2d at 253. Quite simply, to force Mattson to take the stand would impose on the ALJs the onerous burden of sorting through multiple issues of privilege, without effectively advancing any party's cause. Probative evidence is readily available from numerous non-privileged sources, as CUB itself admits. *See* CUB Resp. 5; *Hayes v. Burlington Northern & Santa Fe R.R. Co.*, 323 Ill. App. 3d 474, 480, 752 N.E.2d 470, 476 (1st Dist. 2001) ("convenience" is not a reason to encroach on the attorney-client privilege); *Fischel*

& Kahn, Ltd. v. Van Straaten Gallery, Inc., 189 Ill. 2d 579, 590, 727 N.E.2d 240, 246 (2000) (that “privilege[d] documents present[ed] one alternative means, though perhaps the most convenient, in which [the] information [might] be obtained” did not suffice for waiver).

Lassar, in addition, produced *every one* of his interview memos so as to avoid the least hint of impropriety or any implication that material uncovered by his investigation had been concealed. Finding an expansive waiver in these circumstances because the Mattson interview was among those memos would unreasonably hamper the public interest in encouraging thorough company investigations into wrongdoing, as well as dissuade clients from engaging in the very “full and frank” discussions with their attorneys that the privilege aims to foster. *Hayes*, 323 Ill. App. 3d at 480, 752 N.E.2d at 476; *see also, e.g., Starsight Telecast, Inc. v. Gemstar Dev. Corp.*, 158 F.R.D. 650, 655 (N.D. Cal. 1994) (scope of waiver must be “balanced by the need to protect the frankness of client disclosure”).

There is no concomitant danger of unfairness to CUB that tips the balance in its favor. This is not a situation where Nicor Gas is trying to gain a “tactical advantage” by selectively divulging privileged information. *Graco*, 1995 WL 360590, at *8-9 (no subject matter waiver where “there [was] no indication” that party intended to secure “tactical advantage” by selective disclosure); *Starsight*, 158 F.R.D. at 655 (court should be guided by preventing “unfair partial disclosures”). Both the Mattson interview memo and Lassar himself are available to CUB. More importantly, Nicor Gas is not relying on any of Mattson’s opinions or advice in telling its side of the story. Thus, CUB’s asserted “need” for Mattson’s testimony is illusory, and any claims of “waiver” are unfounded. *See Trustmark Ins. Co. v. General & Cologne Life Re of Am.*, No. 00 C 1926, 2000 WL 1898518, at *8 (N.D. Ill., Dec. 20, 2000) (no waiver where plaintiff did not “affirmatively rely on advice of counsel or counsel’s work product to establish any

element of its case in chief”); *John Morrell & Co. v. Local 304A, United Food & Comm’l Workers*, 913 F.2d 544, 556 (8th Cir. 1990) (general counsel’s testimony in prior action regarding one privileged document did not waive privilege as to four remaining, “insufficiently linked” documents).¹

C. CUB Has Failed To Show Why Mr. Mattson’s Testimony Should Not Be Prohibited By the Work Product Doctrine

In its opening brief (at 8-9), Nicor Gas established that compelling Mattson to testify would also violate the work product doctrine, inasmuch as any legal advice Mattson provided to the Company reflected his “mental processes.” *People v. Spiezer*, 316 Ill. App. 3d 75, 82, 735 N.E.2d 1017, 1022 (2d Dist. 2000). Because CUB fails to rebut this point, or so much as mention the work product doctrine in its response, it has effectively conceded that Mattson’s legal advice to Nicor Gas is shielded by work product immunity—and that requiring his testimony would unavoidably, and impermissibly, tread in such privileged areas. CUB could not advance any meaningful objection in any event: part of Mattson’s duties as Nicor Gas’s regulatory counsel involved representing the Company before the Commission, thus, his advice perforce included “creative and/or intellectual work product” produced in preparation for Commission proceedings. *Spiezer*, 316 Ill. App. 3d at 88, 735 N.E.2d at 1027. Without any demonstration by CUB that “it is absolutely impossible to secure the factual information [within the work product privilege] from other sources,” Mattson may not be called to the stand.

¹ CUB cites just one case as “relevant” to its waiver argument. CUB Resp. 2-3. *Powers v. Chicago Transit Auth.*, 890 F.2d 1355 (7th 1989), did not, however, hold that the dissemination of a memorandum to persons outside the attorney-client relationship constituted “waiver.” Rather, the court found a CTA memo to be “privileged on its face,” but could not resolve any question of waiver because plaintiff refused to identify who, at the CTA, had given him the memo. *Id.* at 1359-1361. Regardless, as we have shown, neither the conduct of the Lassar investigation nor the release of the Lassar Report and interview memos amount to the type of blanket waiver that would be required to put Mattson on the stand.

Mlynarski v. Rush Presbyterian-St. Luke's Med. Ctr., 213 Ill. App. 3d 427, 433, 572 N.E.2d 1025, 1029 (1st Dist. 1991).²

II. CONCLUSION

For all of the foregoing reasons, and those stated in Nicor Gas's opening brief, the Commission should exclude Mr. Mattson as a witness in these proceedings and strike his name from CUB's Final Adverse Witness List.

Dated: April 6, 2004

Respectfully submitted,

NORTHERN ILLINOIS GAS COMPANY
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² Any claim of "waiver" so as to compel Mattson's testimony would likewise be misplaced. Courts have refused to extend the concept of "subject matter" waiver to the work product protection. That is because "[i]f a subject matter waiver of a work product immunity claim is recognized * * * harsh results will necessarily follow, conceivably causing wholesale production of all work product documents from either a terminated or a pending lawsuit whenever production of any work product document is considered a waiver." *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1222 (4th Cir. 1976). Hence, even if the Mattson interview memo were considered a voluntary disclosure of Mattson's work-product, it would be that document alone as to which the privilege is waived. *See id.* at 1223; *In re Bank One Secs. Litig.*, 209 F.R.D. 418, 424-425 (N.D. Ill. 2002) (work product privilege waived only as to documents *actually* produced).

CERTIFICATE OF SERVICE

I, John E. Rooney, hereby certify that I served a copy of the Reply Brief of Nicor Gas in Support of Motion to Exclude Stephen J. Mattson as a Witness in this Proceeding upon the service list in consol. Docket Nos. 01-0705/02-0067/02-0725 by email on April 6, 2004.

John E. Rooney