

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Citizens Utility Board,)
)
 v.) Docket No. 04-0034
)
 Nicor Solutions, L.L.C. and)
 Northern Illinois Gas Company d/b/a)
 Nicor Gas Company)
)
 Complaint requesting the ICC to order)
 Nicor Solutions to cease and desist)
 misleading marketing of gas offering.)

**JOINT¹ DRAFT ORDER OF
NICOR SOLUTIONS, L.L.C. AND
NORTHERN ILLINOIS GAS COMPANY**

By the Commission:

I. Procedural History

On January 15, 2004, the Citizens Utility Board (“CUB”) filed a Complaint seeking an order that Nicor Solutions L.L.C. (“Nicor Solutions”) cease and desist the alleged misleading marketing of its Winter Cap service offering pursuant to Sections 10-101, et seq., 4-101, and 19-120, *et. seq.* of the Public Utilities Act (the “Act”).

On February 1, 2004, Nicor Solutions filed a Special Limited Appearance for the sole purpose of objecting to jurisdiction and a Verified Motion to Dismiss CUB’s Complaint. In its Motion, Nicor Solutions asserted that the Commission lacks jurisdiction because Nicor Solutions is neither a public utility nor an Alternative Gas Supplier (“AGS”) as defined by the Act.

On February 17, 2004, prior to an Administrative Law Judge (“ALJ”) ruling on Nicor Solutions’ Motion, CUB filed a Motion for Leave to Amend Complaint and Add Necessary Party and, simultaneously, filed an Amended Complaint that, in certain part, added Northern Illinois Gas Company (“Nicor Gas”) as a Respondent.

On March 3, 2004, Nicor Solutions and Nicor Gas filed separate Motions to Dismiss the Amended Complaint. Nicor Solutions again asserted that the Commission lacks jurisdiction; Nicor Gas moved for dismissal for failure to state a cause of action. On March 17, 2004, Staff filed a Response supporting dismissal of CUB’s Amended Complaint against both Nicor Solutions and Nicor Gas. Also on March 17, 2004, CUB filed Responses in Opposition to both Motions. Nicor Gas and Nicor Solutions each filed a separate Reply on March 26, 2004.

¹ Nicor Solutions and Nicor Gas are legally separate entities but are filing this Joint Draft Order given the similarity of their positions on the ALJ’s Ruling.

On April 30, 2004, the ALJ denied the Motions to Dismiss of Nicor Solutions and Nicor Gas (“ALJ Ruling”). On May 21, 2004, Nicor Solutions and Nicor Gas filed a Joint Petition for Interlocutory Review of the ALJ’s Ruling and a Joint Draft Order. Responses were due for filing on May 28, 2004.

Pursuant to notice given as required by law and by the rules and regulations of the Commission, an initial status hearing was held at the Commission’s office in Chicago, Illinois on February 18, 2004, and subsequent status hearings held on February 24, 2004, March 30, 2004 and May 20, 2004. As noted, a Special Limited Appearance was entered by counsel on behalf of Nicor Solutions. Nicor Gas, CUB and Staff each appeared by counsel.

II. Discussion

As a matter of background, Nicor Solutions’ Winter Cap service is a billing service. Nicor Solutions asserts that its Winter Cap service is similar to all of the other non-regulated billing services it provides. Purchasers of the Winter Cap billing service pay a set monthly fee in exchange for Nicor Solutions potentially making monetary payments in return from November 1 through March 31 (the “Winter Period”) of each contract year. The amount of any monetary payments to the purchasers during the Winter Period is determined pursuant to the service’s terms, which, in part, are based on the New York Mercantile Exchange (“NYMEX”) market pricing for natural gas. Irrespective, the service consists solely of Nicor Solutions making potential monetary payments during the Winter Period in exchange for the purchasers making set monthly payments to Nicor Solutions. Nicor Solutions does not provision a gas commodity product to any customer as part of its Winter Cap billing service.

In its Motion to Dismiss, Nicor Solutions stated that the Commission does not have jurisdiction because it is neither a public utility nor an Alternative Gas Supplier (“AGS”) as those terms are defined in the Act. (Nicor Sol. Mot., pp. 5-11). The Act defines an AGS as follows:

[E]very person, cooperative, corporation, municipal corporation, company, association, joint stock company or association, firm, partnership, individual, or other entity, their lessees, trustees, or receivers appointed by any court whatsoever, *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....*

220 ILCS 5/19-105 (emphasis added). Nicor Solutions explained that it does not “offer[] gas for sale, lease, or in exchange for other value received to one or more customers, or [] engage[] in the furnishing of gas to one or more customers.” (*Id.*, pp. 5-7). Nicor Solutions only offers, sells and furnishes non-regulated billing services. (*Id.*)

Nicor Solutions also stated that it is not a public utility, which the Act defines as follows:

[E]very corporation, company, limited liability company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever that *owns, controls, operates or manages*, within

this State, directly or indirectly, for public use, *any plant, equipment or property used or to be used for or in connection with*, or owns or controls any franchise, license, permit or right to engage in: a. *the production, storage, transmission, sale, delivery or furnishing of heat, cold, power, electricity, water, or light*, except when used solely for communications purposes

220 ILCS 5/3-105 (emphasis added). Nicor Solutions does not own, control, operate or manage any plant, equipment or property used in connection with the production, storage, transmission, sale, delivery or furnishing of a gas commodity product. (Nicor Sol. Mot., pp. 8-11). Accordingly, Nicor Solutions opined that it is not a public utility. (*Id.*)

The Commission's Staff concurred that Nicor Solutions is not an AGS or a public utility, that the Commission does not have jurisdiction over Nicor Solutions, and that CUB's Amended Complaint should be dismissed against Nicor Solutions. (Staff Res., pp. 1-2). In its Response to the Motions to Dismiss, Staff stated:

The Commission should dismiss [CUB's] Amended Complaint against Nicor Solutions because Nicor Solutions is a non-regulated entity that is not subject to the Commission's jurisdiction. Nicor Solutions is not an Alternative Gas Supplier ("AGS") or a public utility as defined by the [Public Utilities Act ("PUA")], 220 ILCS 5/1-101 et seq. ... Based on the facts alleged, Staff agrees [with Nicor Solutions] that the Commission cannot assert proper jurisdiction over Nicor Solutions because the company lacks status as either an AGS or a public utility.

(*Id.*)

In its Motion to Dismiss, Nicor Gas stated that CUB's Amended Complaint does not state a claim against Nicor Gas. Nicor Gas explained that it is a separate entity from Nicor Solutions and that it is well-established law a corporation is a distinct, independent legal entity that is separate from all other entities with which it may be connected, even affiliates. (Nicor Gas Mot., p. 8). Nicor Gas further explained that it does not offer, sell or provision Nicor Solutions' Winter Cap billing service that is the subject of CUB's Amended Complaint. (*Id.*, p. 5). Rather, Nicor Gas stated that Nicor Solutions alone offers, sells and provisions its Winter Cap service. (*Id.*) Nicor Gas also points out that the Amended Complaint does not contain any allegations that Nicor Gas has violated any Commission regulation, statutory provision of the Act or any other law that the Commission has jurisdiction to enforce. (*Id.*, pp. 3-4). Finally, Nicor Gas stated that CUB's Amended Complaint is inequitable because Nicor Gas cannot be required to respond to allegations against Nicor Solutions. (*Id.*, pp. 7-8). Accordingly, it is Nicor Gas' position that CUB's Amended Complaint does not state a cause of action against Nicor Gas.

The Commission's Staff also concurred with Nicor Gas that CUB's Amended Complaint does not state a cause of action against Nicor Gas. In its Response to the Motions to Dismiss, Staff stated that "[it] agrees with Nicor Gas' Motion to Dismiss CUB's Complaint because CUB has not factually alleged that Nicor Gas has violated any Commission regulation, statutory

provision of the [Act] or any other law that the Commission has jurisdiction to enforce.” (Staff Res., pp. 2-3). Staff further explained as follows:

CUB has not raised any substantive or accurate allegations of wrongdoing by Nicor Gas. CUB simply amended a Complaint, which was originally filed against Nicor Solutions for provisioning Winter Cap, to include Nicor Gas as a party.

(*Id.*)

In its Responses to both Motions, CUB acknowledged that Nicor Solutions and Nicor Gas are separate legal entities. (*See e.g.*, CUB Res. to Nicor Sol. Mot., p. 4 (agreeing that “it is a well-established principle that a corporation is a separate and distinct legal entity ... from other corporations with which it may be affiliated”)). CUB, however, claimed that the Commission could assert jurisdiction by piercing the corporate veil, in essence treating Nicor Solutions and Nicor Gas as one entity. CUB argued that the Commission could do so because Nicor Solutions “is a mere instrumentality of Nicor Gas.”² (*Id.*, pp. 4-8; Amended Complaint, ¶30). CUB set forth certain allegations in support of its claim, namely that Nicor Solutions utilizes the Nicor name and logo, and has purchased bill insert rights as well as billing and collection services from Nicor Gas. (Amended Complaint, ¶¶25-28). CUB also alleged that Nicor Solutions is a mere instrumentality of Nicor Gas because customers of Nicor Solutions’ Winter Cap service agree to take gas service from Nicor Gas. (*Id.*, ¶29). CUB argued that the Commission will “sanction a fraud or injustice” if it does not pierce the corporate veil. (*See e.g.*, CUB Res. to Nicor Gas Mot., p. 8).

CUB also argued in its Response to Nicor Solutions that, in the alternative, the Commission can assert jurisdiction over Nicor Solutions as an AGS. (CUB Res. to Nicor Sol. Mot., pp. 8-11). While Nicor Solutions does not provide a gas service to any customer, CUB noted that an AGS includes an entity that engages in the “furnishing of gas” and argued that the phrase “furnishing of gas” should be interpreted to include marketing, billing and customer services because such services are allegedly necessary, useful and requisite to the furnishing of gas. (*Id.*, pp. 8-9). CUB asserted that limiting the interpretation of the phrase “furnishing of gas” to the actual “furnishing of gas” would be inconsistent with legislative intent. (*Id.*, pp. 10-11).

Nicor Solutions and Nicor Gas both replied to CUB’s claim that the Commission should pierce the corporate veil by explaining that CUB has not pled sufficient allegations to support such action. Nicor Solutions and Nicor Gas pointed out that all of the allegations CUB sets forth to support piercing the corporate veil pertain to legally authorized conduct that cannot constitute the basis for a cause of action. (*See e.g.*, Nicor Sol. Reply, p. 9). In particular, Nicor Solutions explained that the Commission has specifically authorized its use of the Nicor name and logo. (Nicor Sol. Mot., p. 9). Nicor Solutions also explained that it may purchase billing insert rights,

² CUB similarly alleges in its Responses that “Nicor Solutions’ deceptive and misleading marketing activities relating to the Winter Cap program make it a mere instrumentality of Nicor Gas.” (*See e.g.*, CUB Res. to Nicor Gas Mot., p. 6). Not only is the latter emphasized portion of this allegation CUB’s conclusion and opinion, but the allegation that Nicor Solutions’ marketing activities are “deceptive and misleading” is also only CUB’s opinion and conclusion. The Commission is required to disregard these types of allegations in ruling on the Motions to Dismiss.

and billing and collection services from Nicor Gas and that, moreover, Nicor Gas offers similar services to third parties. (*Id.*) With regard to the allegation that Nicor Solutions' customers agree to take gas service from Nicor Gas, it was explained that Nicor Solutions is fully authorized, of its own accord, to limit its Winter Cap offering to any market segment, including Nicor Gas' customers. (*See e.g.*, Nicor Gas Reply, p. 13). Nicor Solutions and Nicor Gas further noted that CUB's only other allegation is conclusory (*See Amended Complaint*, ¶30), and must be disregarded in ruling on the sufficiency of CUB's Amended Complaint. (*Id.*, pp. 9-11). Accordingly, Nicor Solutions and Nicor Gas opined that CUB has not stated a cause of action to pierce the corporate veil.

Nicor Solutions also replied, with respect to CUB's claim that Nicor Solutions should be deemed to furnish gas as an AGS, that CUB's expansive interpretation of the Act is untenable and violates several rules of statutory construction. (Nicor Sol. Reply, pp. 4-7). The plain meaning of the phrase "furnishing of gas," in Nicor Solutions' opinion, is the actual "furnishing of gas," which Nicor Solutions does not do. Nicor Solutions further stated that CUB's expansive interpretation would be inconsistent with legislative intent because the legislature clearly intended to limit the definition of an AGS to those entities that actually furnish gas. (*Id.*, pp. 6-8).

As noted above, on April 30, 2004, the ALJ's Ruling denied the Motions to Dismiss. The ALJ's Ruling states in total as follows:

Notice is hereby given by the Administrative Law Judge that based on the fact that by signing up for the Nicor Solutions' Winter Cap, the customer authorizes the Company to switch the customer's gas supplier, I feel that the Illinois Commerce Commission has Jurisdiction over this Complaint. Therefore, Nicor's and Nicor Solutions' Motions to Dismiss are denied by the Administrative Law Judge.

(ALJ Ruling, p. 1).

Nicor Solutions and Nicor Gas filed a Joint Petition for Interlocutory Review.³ They made several arguments that the ALJ's Ruling constitutes reversible error. First and foremost, Nicor Solutions and Nicor Gas explained that the ALJ's Ruling does not address the grounds they pled for dismissal. In particular, for Nicor Solutions, the ALJ's Ruling does not address the Commission's lack of jurisdiction. (Pet., pp. 4-6). For Nicor Gas, the ALJ's Ruling does not address CUB's failure to state a cause of action. (*Id.*) They also noted that the reason the ALJ states for the Ruling is not relevant to the grounds they pled for dismissal. (*Id.*, p. 7).

Nicor Solutions and Nicor Gas further stated that the ALJ's Ruling is unclear, but that it is possible the ALJ intended to pierce the corporate veil. If that is the case, they argued that the ALJ's Ruling has no basis in law. They stated, rather, that piercing the corporate veil is a highly

³ Nicor Solutions and Nicor Gas noted that while they are legally separate entities they filed a Joint Petition for Interlocutory Review given the similarity of their positions on the ALJ's Ruling. (Pet., p. 1, n. 1).

complex legal maneuver that the courts define as an extreme action and dictate must be entertained only reluctantly and only based on a substantial showing. (*Id.*, p. 9). They also noted that the courts hold a single factor cannot be relied upon to pierce a corporate veil. (*Id.*) It is Nicor Solutions' and Nicor Gas' position, therefore, that the ALJ's Ruling, which relies on only a single factor, rests on insufficient grounds by definition. (*Id.*) They also asserted that the single factor relied upon is not relevant to the requisite showing for piercing a corporate veil, which is the existence of a dummy or sham corporation. (*Id.*, pp. 8-9). They explained Nicor Solutions is entirely authorized to limit its service to Nicor Gas' customers, and its decision to do so does not make it a dummy or sham corporation. (*Id.*) Nicor Solutions and Nicor Gas also opined that piercing the corporate veil would cause the Commission to assert jurisdiction improperly over a non-regulated entity and non-regulated service. (*Id.*, pp. 11-12).

Finally, Nicor Solutions and Nicor Gas again noted the lack of clarity as to the ALJ's intent for the Ruling, and further noted that the ALJ could have intended to assert jurisdiction solely over the issue of whether any of Nicor Solutions' customers who agreed to take gas service from Nicor Gas but had been taking service from another gas supplier were transferred appropriately. (*Id.*, pp. 12-13). If that is the case, Nicor Solutions and Nicor Gas stated that the ALJ's Ruling goes beyond the scope of CUB's Amended Complaint. (*Id.*) They explained that CUB's Amended Complaint only claims that Nicor Solutions allegedly marketed its Winter Cap service misleadingly. (*Id.*) To the extent that it was the ALJ's intent to assert jurisdiction with regard to whether customers were transferred appropriately, therefore, Nicor Solutions and Nicor Gas asserted that the ALJ's Ruling is based on insufficient grounds because CUB's Amended Complaint does even plead that any customer transfer occurred inappropriately. (*Id.*)

[Insert any Responses from the Commission's Staff and CUB here.]

III. Commission Analysis and Conclusions

The Commission agrees with both Nicor Solutions and Staff that the Commission does not have jurisdiction over Nicor Solutions or its Winter Cap billing service. The Commission is of the opinion that Nicor Solutions is neither a public utility nor an AGS. Nicor Solutions does not meet the Act's clear statutory definition of an AGS because it does not "offer[] gas for sale, lease, or in exchange for other value received to one or more customers, or [] engage[] in the furnishing of gas to one or more customers." 220 ILCS 5/19-105. In addition, Nicor Solutions does not satisfy the Act's definition of a public utility because it does not own, control, operate or manage any plant, equipment or property used in connection with the production, storage, transmission, sale, delivery or furnishing of a gas commodity product. Nicor Solutions only offers, sells and furnishes non-regulated billing services.

With regard to Nicor Gas, the Commission also agrees with its Staff and Nicor Gas that CUB's Amended Complaint does not state a cause of action. Nicor Gas and Nicor Solutions are legally separate entities. *Daley v. American Drug Stores, Inc.*, 294 Ill.App.3d 1024, 1027, 691 N.E.2d 846, 849 (1st Dist. 1998); *Flynn v. Allis Chalmers Corp.*, 262 Ill.App.3d 136, 140, 634 N.E.2d 8, 10 (2nd Dist. 1994). Nicor Gas does not sell or provision the Winter Cap billing service that is the subject of CUB's Amended Complaint. Nicor Solutions, rather, is the sole provider of the Winter Cap billing service. Nicor Gas cannot be required to respond to allegations as to Nicor Solutions' Winter Cap service.

We do not find the single reason stated for the ALJ's Ruling compelling. Nicor Solutions as a non-regulated entity is entitled to limit its service to any group of customers or market segment. The Commission cannot acquire jurisdiction over Nicor Solutions simply because Nicor Solutions may have decided to limit its service to Nicor Gas' customers. Similarly, any decision by Nicor Solutions to limit its service does not somehow result in CUB's Amended Complaint stating a cause of action against Nicor Gas.

Nonetheless, we also find the intent of the ALJ's Ruling unclear. It is possible that the ALJ's Ruling was not intended to deny the Motions to Dismiss because of any belief that the Commission has jurisdiction over Nicor Solutions or that the Amended Complaint states a cause of action against Nicor Gas. Rather, as Nicor Solutions and Nicor Gas pointed out, it is possible the ALJ intended, for the reason stating in the Ruling, to either pierce the corporate veil or assert jurisdiction over the single issue of whether any of Nicor Solutions' Winter Cap customers were inappropriately transferred to Nicor Gas' gas service.

To the extent that the ALJ intended to pierce the corporate veil, we do not believe that the single factor the Ruling relies upon is sufficient. We agree with Nicor Solutions and Nicor Gas that piercing a corporate veil is an extreme legal maneuver that must be entertained reluctantly and only based on a substantial showing. *Jacobson v. Buffalo Rock Shooters Supply, Inc.*, 278 Ill.App.3d 1084, 1088, 664 N.E.2d 328, 331 (3rd Dist. 1996), *reh'g denied*. The substantial showing required is that one corporation so dominates another that the latter is merely a dumb or sham corporation for the former. (*Id.*) The courts are also very clear that a single factor is insufficient to satisfy this substantial showing. (*Id.*) As the ALJ's Ruling only rests on a single factor, we believe that the ground the Ruling rests upon is, by definition, insufficient to pierce the corporate veil.

We also believe that the single factor the ALJ's Ruling relies upon does not demonstrate Nicor Solutions to be a sham corporation. As noted, there is no prohibition on Nicor Solutions deciding to limit its service to any market segment. The reliance on any decision Nicor Solutions may have made to limit its Winter Cap service offering is misplaced because it does not demonstrate any exercise of control by Nicor Gas.

The Commission is further of the opinion that CUB did not plead sufficient grounds to pierce the corporate veil. Apart from the single reason set forth in the ALJ's Ruling, which essentially is the allegation CUB sets forth in Paragraph 29 of its Amended Complaint, all of CUB's factual allegations pertain to legally authorized conduct that, as a matter of law, cannot constitute the basis for any cause of action, including one to pierce the corporate veil. *Lanier v. Associates Finance, Inc.*, 114 Ill.2d 1, 17-18, 449 N.E.2d 440 (1986). Indeed, we also believe that the factor the ALJ's Ruling relied upon is legally authorized conduct that cannot be the basis for a cause of action. Nicor Solutions is entitled to limit its service, and CUB cited no legal authority to the contrary. As such, the Commission places no weight on this factor. The only other allegation CUB pled is conclusory and must also be disregarded. *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 417, 430 N.E.2d 976, 981 (1981). As all of CUB's allegations either pertain to legally authorized conduct or are conclusory, we find that CUB did not plead sufficient allegations to satisfy the substantial showing required to pierce a corporate veil.

Finally, to the extent the ALJ instead intended to assert jurisdiction over the issue of whether any customers were transferred properly, we find that the ALJ's Ruling is beyond the

scope of CUB's Amended Complaint. The only claim set for in CUB's Amended Complaint is that Nicor Solutions allegedly marketed its Winter Cap service misleadingly. There is no basis for the ALJ's Ruling if it was intended to assert jurisdiction over a claim that was not stated in the Amended Complaint.

The Commission believes, therefore, that Nicor Solutions' and Nicor Gas' Motions to Dismiss should be granted. We further believe that the Motions should be granted with prejudice. CUB could not amend because the Commission does not have jurisdiction over Nicor Solutions and any claim as to the alleged misleading marketing of Nicor Solutions' Winter Cap service cannot be maintained against Nicor Gas. A motion to dismiss is properly granted with prejudice when a complaint cannot be amended to rectify its infirmities. *Hume & Liechty Veterinary Assoc. v. Hodes*, 259 Ill.App.3d 367, 370, 632 N.E.2d 46, 49 (1st Dist. 1994); *Ontap Premium Quality Waters, Inc. v. Bank of Northern Illinois*, 262 Ill.App.3d 254, 264, 634 N.E.2d 425, 433 (2nd Dist. 1994).

IV. Findings and Ordering Paragraphs

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

- (1) Nicor Solutions is neither a Public Utility nor an Alternative Gas Supplier ("AGS") as those terms are defined in the Act;
- (2) the Commission does not have jurisdiction over Nicor Solutions or its Winter Cap service;
- (3) Nicor Gas is a corporation engaged in the sale and distribution of natural gas in Illinois and, as such, is a public utility within the meaning of the Public Utilities Act;
- (4) The amended Complaint filed by CUB does not state a cause of action against Nicor Gas; and
- (5) the statements of fact set forth in the prefatory portion of this Order are supported by the evidence and the record and are hereby adopted as findings of fact.

IT IS THEREFORE ORDERED that, the Citizens Utilities Board's Amended Complaint against Nicor Solutions and Nicor Gas is dismissed with prejudice.

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

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

* * * * *

WHEREFORE, Nicor Solutions, L.L.C. and Northern Illinois Gas Company respectfully requests that their Draft Order as submitted herein be adopted, and that the Commission grant any and all other appropriate relief.

Dated: May 21, 2004

Respectfully submitted,

NICOR SOLUTIONS, L.L.C.

NORTHERN ILLINOIS GAS COMPANY
D/B/A NICOR GAS COMPANY

By: _____
One of its attorneys

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CERTIFICATE OF SERVICE

I, Michael Guerra, hereby certify that I served a copy of the Draft Order on Behalf of Nicor Solutions, L.L.C. and Northern Illinois Gas Company d/b/a Nicor Gas Company upon the service list in Docket No. 04-0034 by electronic mail on May 21, 2004.

Michael Guerra