

**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. )

**MOTION TO COMPEL NICOR SOLUTIONS, LLC TO ANSWER  
CITIZENS UTILITY BOARD’S VERIFIED AMENDED COMPLAINT**

Pursuant to 200.190 of the Rules of Practice of the Illinois Commerce Commission (“the Commission”), the Citizens Utility Board (“CUB”) respectfully submits its Motion To Compel Nicor Solutions LLC to Answer CUB’s Verified Amended Complaint.

**Background**

On May 20, 2004, the Administrative Law Judge (“ALJ”) declined to compel Nicor Solutions LLC (“Nicor Solutions”) to answer the Citizens Utility Board’s Verified Amended Complaint relating to the Winter Cap program. May 10, 2004 Tr. at 24. The ALJ made the ruling so Nicor Solutions would not waive its right to contest jurisdiction under its previously filed Special and Limited Appearance. *Id.* at 28.

**Legal Standard**

The Illinois Code of Civil Procedure applies to appearances made in order to contest personal jurisdiction. *See* 735 ILCS 5/2-301(a). A party may object to the court’s jurisdiction if that party has not yet filed a responsive pleading in the case at hand. *Id.* If the objecting party

files a responsive pleading *prior* to objecting to jurisdiction, then that party waives its ability to object to jurisdiction. *See* 735 ILCS 5/2-301(a-5) (emphasis added).

### Argument

#### **I. The ALJ's Decision Not To Compel Nicor Solutions To Answer CUB's Verified Amended Complaint Was Erroneous**

The ALJ's decision not to compel Nicor Solutions to answer CUB's Verified Amended Complaint was erroneous. Under Section 301(a-5), Nicor Solutions merely needed to object to jurisdiction in order to preserve its defense that the Commission lacks jurisdiction to hear CUB's Verified Amended Complaint. *See* 735 ILCS 5/2-301(a-5). In making his decision, the ALJ stated that the Commission must resolve the jurisdictional issue before compelling Nicor Solutions to proceed further in this matter. May 10, 2004 Tr. at 28. The ALJ reasoned that ordering Nicor Solutions to answer CUB's Verified Amended Complaint could result in Nicor Solutions waiving its "special limited status" and right to contest jurisdiction. *Id.* However, the governing statute on appearances makes clear that the ruling was based upon old law.

##### **a. The General Assembly Has Abolished the Distinction Between General and Special Appearances So Nicor Solutions Cannot Make A Special Appearance**

CUB notes that the Code of Civil Procedure no longer makes a distinction between general and special appearances. 735 ILCS 5/2-301. The General Assembly amended the Code of Civil Procedure in 1999 to abolish that distinction. *Id.* The previous incarnation of this rule, 735 ILCS 5/2-301(a), included the following language:

Prior to filing any other pleading or motion, a *special appearance* may be made either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person of the defendant. A *special appearance* may be made as to an entire proceeding or as to any cause of action involved therein. Every appearance prior to judgment, not in compliance with the foregoing is a general appearance.

735 ILCS 5/2-301(a) (West 1998) (emphasis added). However, the current rule states:

Sec. 2-301. Objections to jurisdiction over the person.

(a) Prior to the filing of any other pleading or motion other than a motion for an extension of time to answer or otherwise appear, a party may object to the court's jurisdiction over the party's person, either on the ground that the party is not amenable to process of a court of this State or on the ground of insufficiency of process or insufficiency of service of process, by filing a motion to dismiss the entire proceeding or any cause of action involved in the proceeding or by filing a motion to quash service of process. Such a motion may be made singly or included with others in a combined motion, but the parts of a combined motion must be identified in the manner described in Section 2-619.1. Unless the facts that constitute the basis for the objection are apparent from papers already on file in the case, the motion must be supported by an affidavit setting forth those facts.

(a-5) If the objecting party files a responsive pleading or a motion (other than a motion for an extension of time to answer or otherwise appear) prior to the filing of a motion in compliance with subsection (a), that party waives all objections to the court's jurisdiction over the party's person.

735 ILCS 5/301(a), (a-5). Accordingly, Nicor Solutions *cannot* preserve its objection to jurisdiction by making a “special and limited appearance.”

**b. Nicor Solutions Preserved Its Objection to Jurisdiction by Filing Its Prior Motion To Dismiss For Lack of Jurisdiction**

The Code of Civil Procedure explicitly states: “if the objecting party files a responsive pleading or a motion ... *prior* to the filing of a motion [objecting to jurisdiction] ...that party waives all objections to the court’s jurisdiction over the party’s person.” 735 ILCS 5/2-301(a-5) (emphasis added). The meaning of the statute is clear; to preserve its objection to jurisdiction, an objecting party must file its objection prior to further proceedings. In the instant case, Nicor Solutions has preserved its objection to the Commission’s jurisdiction by filing its prior Motion to Dismiss for lack of jurisdiction. *See* Nicor Solutions’ Verified Motion to Dismiss Amended Complaint (filed March 3, 2004). The statute does not state that a party’s further participation in a case *after* making its jurisdictional objection results in a waiver of that objection. *See* 735

ILCS 5/2-301. Nor does the statute bar further proceedings after the objecting party has made its objection. *Id.*

## **II. The ALJ Should Order Nicor Solutions To Answer CUB's Verified Amended Complaint**

The ALJ should order Nicor Solutions to answer CUB's Verified Amended Complaint. Doing so will not result in Nicor Solutions waiving its objection to the Commission's jurisdiction, because Nicor Solutions has already filed its Motion to Dismiss. As a result, Nicor Solutions has properly objected to jurisdiction *prior* to the filing of any responsive pleadings and has preserved its objection for the future of the proceedings. Thus, the ALJ can order Nicor Solutions to answer CUB's Verified Complaint without jeopardizing its jurisdiction objection.

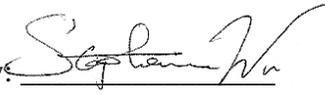
Absent such an appropriate order, Nicor Solutions' failure to answer CUB's Verified Amended Complaint will only serve to delay indefinitely the ultimate disposition of the case. The Commission should adjudicate this case as rapidly as possible to limit the harm to customers who enrolled in the Winter Cap program. Those customers would be well served if the Commission issued a final order prior to the upcoming heating season, exactly when the Winter Cap program misleadingly suggests that it will save customers money on their gas bills. *See* Winter Cap Solicitation Materials, Attachment 1 to CUB's Original Verified Complaint. Also, Nicor Solutions continues to solicit new customers for its Winter Cap program. *See* Nicor Solutions Web site, ([http://www.nicor.com/en\\_us/nicor\\_solutions/](http://www.nicor.com/en_us/nicor_solutions/)) (last visited June 21, 2004). Earlier Commission action will stop more customers from being harmed by the Winter Cap program's deceptive marketing. If the Commission ultimately acts in CUB's favor, then the precedential value of the Commission's action will also cause Nicor Solutions and other firms to market their other natural gas-related products in a more transparent and unambiguous manner.

For all of these reasons, the ALJ must, in accordance with Illinois law, order Nicor Solutions to answer CUB's Verified Amended Complaint to prevent further delay of the case.

**Conclusion**

WHEREFORE, CUB requests that the ALJ order Nicor Solutions to answer CUB's Verified Amended Complaint within 10 days of the ALJ's order on this Motion.

Respectfully Submitted:

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Dated: this 21<sup>st</sup> day of June 2004