

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.)

**VERIFIED RESPONSE OF THE CITIZENS UTILITY BOARD
IN OPPOSITION TO NORTHERN ILLINOIS GAS COMPANY’S
VERIFIED MOTION TO STAY DISCOVERY**

Pursuant to Section 200.190 of the Illinois Commerce Commission’s (“Commission”) Rules of Practice (83 Ill. Admin. Code §200.190) and the Administrative Law Judge’s June 16, 2004, Order, The Citizens Utility Board (“CUB”) hereby files its Response in Opposition to the Motion to Stay Discovery (“Motion”) of Northern Illinois Gas Company (“Nicor Gas”). The Motion should be denied because, contrary to Nicor Gas’ arguments, discovery can and should continue.

Background

On May 20, 2004, the Administrative Law Judge (“the ALJ”) ruled that Nicor Gas had to answer CUB’s Verified Amended Complaint. May 20, 2004 Tr. at 22. The ALJ also ruled that discovery could commence. *Id.* CUB submitted its first set of data requests to Nicor Gas later that day. Twenty-five days later, on June 14, 2004, Nicor Gas filed its Verified Motion to Stay Discovery (“the Motion”).

Legal Standard

Nicor Gas' Motion seeks to stay discovery pending the resolution of its Petition for Interlocutory Review of the ALJ's April 30, 2004, order denying Nicor Gas' motion to dismiss ("the Petition"). However, Section 200.520 of the Commission's Rules of Practice ("the Rules") states: "[o]nly in extraordinary circumstances shall an interlocutory review of a ruling of a Hearing Examiner suspend a hearing." 83 Ill. Admin. Code §200.520. With regard to discovery, the Commission's Rules say:

It is the policy of the Commission to obtain full disclosure of all relevant and material facts to a proceeding. Further, it is the policy of the Commission to encourage voluntary exchange by the parties and staff witnesses of all relevant and material facts to a proceeding through the use of requests for documents and information.

83 Ill. Admin. Code §200.340. Under Section 200.370(b) of the Commission's Rules, the ALJ "may at any time on his or her own initiative, or on motion of any party or Staff, issue such rulings as justice requires, denying, limiting, conditioning or regulating discovery to prevent unreasonable annoyance, expense, disadvantage or oppression." 83 Ill. Admin. Code §200.370(b). However, a party seeking to invoke Section 200.370(b) "shall incorporate a statement showing that consultation and reasonable attempts to resolve differences [involving discovery] have failed." 83 Ill. Admin. Code §200.350.

Argument

The ALJ should deny Nicor Gas's Motion and not suspend discovery in this proceeding because of Nicor Gas' pending Petition. The Commission's Rules and Nicor Gas's failure to comply with them require the ALJ to deny Nicor Gas's Motion.

I. Nicor Gas Has Failed To Show That Its Pending Petition for Interlocutory Review Is an Extraordinary Circumstance Justifying Staying Discovery and Suspending the Hearing

Nicor Gas has failed to show that its pending petition is an “extraordinary circumstance” that justifies staying discovery and suspending this proceeding. Under the Commission’s Rules, pending petitions for interlocutory review, absent extraordinary circumstances, do not suspend a hearing. *See* 83 Ill. Admin. Code §200.520. However, Nicor Gas declined to argue in its Motion that the Company’s pending Petition was an “extraordinary circumstance” within the meaning of the applicable Rule. CUB has found no Commission order or Illinois court case stating that a pending petition for interlocutory review of an order denying a motion to dismiss for failure to state a cause of action is an “extraordinary circumstance” justifying a stay of discovery and a suspension of the hearing. Apparently, neither has Nicor Gas, as evidenced by its inability to cite legal authority to support its argument that its pending Petition should stay discovery.

While the Commission has placed Nicor Gas’s Petition on its bench agenda for June 23, 2004, the Commission may elect to hold the matter indefinitely without ruling on the matter. Nothing in the Commission’s Rule on petitions for interlocutory review, Section 520, requires the Commission to act upon Nicor Gas’s Petition within any specified timeframe. *Id.* As the ALJ recognized during the May 20, 2004, status hearing, failing to proceed with discovery until the Commission denies Nicor Gas’s Petition will place this proceeding “that much further behind.” May 20, 2004 Tr. at 22.

II. Nicor Gas Failed To Consult with CUB To Resolve Differences Over Discovery As Required by the Commission’s Rules of Practice

Nicor Gas failed to consult with CUB to resolve its differences over CUB’s discovery requests as required by the Commission’s Rules. CUB submitted its discovery requests to Nicor

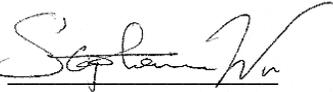
Gas on May 20, 2004, the same day the ALJ required the Company to answer CUB's Verified Amended Complaint. Twenty-five days later, Nicor Gas filed its Motion and claimed, for the first time, that CUB's discovery requests were unduly burdensome. Motion at 1, 3-4.

While explicitly invoked by Nicor Gas, Section 200.370(b) of the Commission's Rules governs Nicor Gas's Motion, because the Company presumably seeks to have the ALJ issue an order "denying, limiting, conditioning or regulating discovery to prevent unreasonable annoyance, expense, disadvantage or oppression." 83 Ill. Admin. Code §200.370(b). However, for Nicor Gas to properly seek such an order, its Motion "must incorporate a statement showing that consultation and reasonable attempts to resolve differences have failed," as required by Section 200.350 of the Commission's Rules. 83 Ill. Admin. Code §200.350. This Nicor Gas has not done. Indeed, Nicor Gas failed to make *a single communication* with CUB regarding any differences over discovery the Company may have had prior to filing its Motion. Instead, Nicor Gas waited until three days ahead of when its discovery responses were due prior to making known for the first time that it had any objections to CUB's discovery requests. CUB's discovery requests, though comprehensive, are completely relevant to the issues in the case, and requiring Nicor Gas to respond to them would not be unduly burdensome. Had Nicor Gas consulted with CUB earlier about its discovery concerns, the Company and CUB could have perhaps reached amicable compromises about discovery. Rather than pursuing the course of action contemplated by the Rules, Nicor Gas chose to burden the ALJ and CUB by filing this motion. Accordingly, the ALJ should deny the Motion because allowing discovery to proceed will further the Commission's policy of full disclosure of all relevant and material facts as well as expedite the ultimate disposition of this case.

Conclusion

WHEREFORE for the reasons stated above, CUB respectfully requests the ALJ to deny Nicor Gas' Motion To Stay Discovery, or, in the alternative, to deny Nicor Gas' Request for Reconsideration of the ALJ's prior order to proceed with discovery. CUB also respectfully requests that the ALJ order Nicor Gas to respond immediately to CUB's data requests submitted more than twenty-eight days ago.

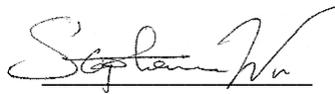
Respectfully Submitted,

By: 

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Dated: this 23rd day of June 2004

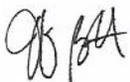
VERIFICATION

I, Stephen Y. Wu, being first duly sworn, state that I am Legal Counsel for the Citizens Utility Board, that I am authorized to make this Verification on its behalf, that I have read the foregoing Verified Response in Opposition to the Verified Motion To Stay Discovery of Northern Illinois Gas Company, that I have knowledge of the facts stated therein, and that the same are true and correct to the best of my knowledge.



Stephen Y. Wu

Subscribed and sworn to before me
this 23rd day of June, 2004.


Jennifer Bontrager
Notary Public

