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.	)	

RESPONSE OF THE CITIZENS UTILITY BOARD TO
NICOR SOLUTIONS, LLC'S
MOTION TO DISMISS AND REQUEST FOR INTERIM ORDER

Pursuant to Section 200.190 of the Illinois Commerce Commission's ("Commission") Rules of Practice (83 Ill. Admin. Code §200.190) and the September 2, 2004, Order of the Administrative Law Judge ("ALJ"), the Citizens Utility Board ("CUB") hereby files it Response to the Verified Motion To Dismiss and Request for Interim Order ("Motion") of Nicor Solutions, LLC ("Nicor Solutions").

Introduction

The ALJ should deny Nicor Solutions' Motion. CUB's Second Amended Complaint properly pleads allegations that Nicor Solutions violated Sections 7-101(3), 8-501, 9-250, and 19-115 of the Public Utilities Act ("the Act") based upon three theories of liability.

First, CUB alleged Nicor Solutions violated Section 7-101(3) by entering into an agreement with its affiliated interest, Nicor Gas, to switch deceptively or "slam" the gas supplier of Winter Cap program enrollees who had received their gas service from an Alternative Gas Supplier ("AGS"). Nicor Solutions argues that Section 7-101 does not grant the Commission

jurisdiction to hear claims against public utility affiliates and that Section 7-101 does not provide the Commission the authority to grant CUB the relief it seeks. Motion at 14-15. However, Section 7-101(3) clearly supplies the Commission the authority to hear claims against public utilities and their affiliates as well as the power to grant CUB's requested relief. Also, Nicor Gas's Motion To Dismiss shows that Nicor Solutions and Nicor Gas had an agreement to switch Winter Cap program customers' gas suppliers back to Nicor Gas. Nicor Solutions and Nicor Gas failed to file that agreement with the Commission for its approval, and, thus violated Section 7-101(3) of the Act. *See* 220 ILCS 5/7-101(3).

Second, CUB also alleged that Nicor Solutions was acting as a mere instrumentality of Nicor Gas when they switched deceptively the gas suppliers of Winter Cap program customers. As a result, the Commission must disregard their separate existences and find that Nicor Solutions violated Sections 8-501 and 9-250 of the Act. Nicor Solutions argues that the courts only undertake such an action reluctantly, and that the Commission should to decline to do so here, because all of CUB's allegations involve authorized conduct. *See* Motion at 11-12. However, no statute, case, or regulation authorizes slamming. In fact, the Commission has expressly held that switching a utility service provider without adequate disclosure in plain language is an unjust and unreasonable practice in violation of Sections 8-501 and 9-250 of the Act. Also, the facts demonstrate that Nicor Solutions and Nicor Gas acted together closely to do just that. Moreover, if the Commission declined to pierce the corporate veil between Nicor Solutions and Nicor Gas, then it would be sanctioning the fraud and injustice they committed upon Winter Cap customers whose gas suppliers they deceptively switched.

Third and lastly, CUB alleged that Nicor Solutions was acting as an AGS when it marketed the Winter Cap program without adequate disclosures in violation of Section 19-115 of

the Act. *See* Second Amended Complaint at ¶¶54-56. Nicor Solutions argues that it does not meet the definition of an AGS such that the Commission can assert its jurisdiction over it because it does not "furnish gas". Motion at 9. Nicor Solutions also argues that since it does not have a certificate to operate as an AGS, the Commission cannot regulate it as one. *Id*. at 8. However, Nicor Solutions does meet the definition of an AGS using established rules of statutory construction that the Commission has accepted. Moreover, if the Commission accepts Nicor Solutions' interpretation of Article XIX of the Act, then it will essentially permit AGSs to opt out of Commission jurisdiction by simply not seeking a certificate while furnishing gas to customers. Aside from satisfying jurisdiction, CUB has, more importantly, alleged sufficient facts to show that Nicor Solutions marketed the Winter Cap program in a deceptive manner because customers had very little probability of saving any money against their gas bills. Second Amended Complaint at ¶19.

CUB's Second Amended Complaint satisfies Illinois's requirements of pleading sufficient facts to support its allegations that Nicor Solutions violated Sections 7-101(3), 8-501, 9-250, and 19-115 of the Act. CUB also notes that the ALJ and the Commission have already denied Nicor Solutions' prior motion to dismiss CUB's First Amended Complaint, which contained many of the same arguments Nicor Solutions raises again now. *See* ALJ's April 30, 2004 Order *and* the Commission's June 29, 2004, Order Denying Nicor Gas and Nicor Solutions' Joint Petition for Interlocutory Review. For these reasons, the ALJ should deny Nicor Solutions' Motion in its entirety.

Background

On July 23, 2004, CUB filed a Motion for Leave To File *Instanter* its Second Amended Complaint. CUB amended its First Amended Complaint in light of new information and to

streamline the case going forward. Nicor Gas and Nicor Solutions untimely filed a Joint Response to CUB's Motion for Leave To File *Instanter* its Second Amended Complaint on August 11, 2004. CUB filed its Reply to the Joint Response on August 18, 2004. During a September 2, 2004, hearing, the ALJ granted CUB's Motion for Leave To File *Instanter* its Second Amended Complaint and required Nicor Gas and Nicor Solutions to answer the complaint or otherwise plead. On September 23, 2004, Nicor Solutions filed its current Motion.

Legal Standard

Nicor Solutions faces significant legal hurdles in order to succeed on a Motion to Dismiss. The Code of Civil Procedure applies to motions to dismiss before the Commission. *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. *See 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 Enter. v. Ill. Founders Ins. Co.*, 114 Ill. 2d 278, 286 (1986). S*ee also, Doyle v. Schlensky*, 120 Ill. App. 3d 807, 811 (1983); *Ontap Premium Quality Waters, Inc. v. Bank of Northern Ill.*, 262 Ill. App. 3d 254, 258 (1994). 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'n of Teachers Local No. 886*, 46 Ill. 2d 439, 446-47 (1970)). Therefore, CUB only had to allege ultimate facts within its Second Amended Complaint in order to survive a motion to dismiss.

Argument

I. Section 7-101(3) of the Act And the Facts in This Case Allow CUB To Pursue Its Claim Against Nicor Solutions As Stated in Count I of the Second Amended Complaint and Obtain the Relief that CUB Is Seeking

a. Section 7-101(3) of the Act allows CUB To Pursue Its Claim Against Nicor Solutions And Provides the Commission the Power To Grant the Relief that CUB Is Seeking

Nicor Solutions argues that Section 7-101 does not grant the Commission authority to hear complaints against public utility affiliates. Motion at 14. Nicor Solutions also argues that Section 7-101 does not provide the Commission with the power to grant CUB's requested relief. *Id*. at 15.

However, Section 7-101 supports CUB's allegation and its requested relief. Nicor Solutions disingenuously ignores the plain text of Section 7-101(3) to divert the Commission's attention to Section 7-101's grant of access to a public utility affiliate's books and records. Section 7-101(3) states:

> No . . . contract or arrangement for the purchase, sale, lease or exchange of any property or for the furnishing of any service, property or thing, hereafter made with any affiliated interest, as hereinbefore defined, shall be effective unless it has first been filed with and consented to by the Commission or is exempted in accordance with the provisions of this Section or of Section 16-111 of this Act. The Commission may condition such approval in such manner as it may deem necessary to safeguard the public interest. *If it be found by the Commission, after investigation and a hearing, that any such contract or arrangement is not in the public interest, the Commission may disapprove such contract or arrangement. Every contract or arrangement not consented to or excepted by the Commission as provided for in this Section is void.*

220 ILCS 5/7-101(3) (emphasis added). The statute clearly contemplates complaints against public utilities and their affiliates, because it provides for an "investigation and a hearing" to determine whether or not a particular inter-affiliate contract or arrangement is in the public interest. Moreover, the Illinois Supreme Court has held that 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 Ill.*, 119 Ill. 2d 419, 427 (1988) (emphasis added). If the Commission accepted Nicor Solutions' interpretation, then it would deprive itself of the ability to hear complaints and learn of inter-affiliate contracts or arrangements public utilities and their affiliates have chosen not to file. This would be an absurd result in violation of accepted rules of statutory construction. *See Mich. Ave. Nat'l. Bank v. County of Cook*, 191 Ill. 2d 493, 504 (2000); *Mulligan v. Joliet Reg'l Port Dist.*, 123 Ill..2d 303, 313 (1988).

Also, Section 7-101(3) clearly states: "[e]very contract or arrangement not consented to or excepted by the Commission . . . is void." 220 ILCS 5/7-101(3). CUB, in subpart c) of its prayer for relief, asks the Commission to issue an order voiding any agreement between Nicor Solutions and Nicor Gas concerning switching Winter Cap program customers' gas suppliers from AGSs to Nicor Gas. Second Amended Complaint at 11. Section 7-101(3), thus, clearly allows the Commission to grant the relief that CUB seeks to put customers back in the position they were in prior to enrolling in the Winter Cap program.

b. <u>The Facts Show Nicor Solutions and Nicor Gas Had an Agreement To Switch Winter Cap Program Customers' Gas Suppliers As CUB Alleged</u>

The facts support CUB's allegation that Nicor Solutions and Nicor Gas had an agreement to switch Winter Cap program customers' gas suppliers. However, Nicor Solutions attached an affidavit from its General Manager, Mr. Paul Delacey, in an attempt to counter CUB's claim. In his affidavit, Mr. Delacey stated that:

> Nicor Solutions has not entered into an agreement with Nicor Gas pursuant to which Nicor Solutions has agreed to switch its Winter Cap customers' gas suppliers from AGSs to Nicor Gas *in exchange for any consideration* from Nicor Gas.

See Delacey Affidavit at ¶9 (emphasis added). However, public utilities and their affiliates do not trigger the requirements of Section 7-101(3) only when they enter into agreements "in exchange for consideration" or formal, legally binding contracts. Section 7-101(3) plainly applies to more than contracts and includes mere "arrangements" between public utilities and their affiliates. Mr. Delacey has only denied that Nicor Solutions and Nicor Gas did not have a formal, legally binding contract to switch Winter Cap program customers' gas suppliers to Nicor Gas. *Id*. Mr. Delacey did not deny that Nicor Solutions and Nicor Gas might have agreed to do so *without* any consideration flowing to Nicor Solutions.

Mr. Delacey also asserted that: "Nicor Solutions independently decided to limit its Winter Cap service to customers of Nicor Gas." *Id*. But, an examination of the facts shows that that is simply not what happened. Nicor Solutions did not limit its solicitation to just Nicor Gas customers; it had them sent to potential customers who received gas service from AGSs as well, as evidenced by the fact that Nicor Gas switched 221 Winter Cap program customers' gas suppliers to itself. *See* Nicor Gas Response to CUB DR 1.15 (Attachment 1). This was not coincidental because Nicor Gas knew exactly what would happen to an AGS customer who enrolled in the Winter Cap program.

According to Nicor Gas, it had an oral contract with Nicor Solutions to abide by the terms of an advertising agreement previously signed by Nicor Gas and another affiliate, Nicor Services, regarding bill inserts. Nicor Gas Response to CUB DR 1.25 (Attachment 2). That advertising agreement states: "Nicor Gas may, at its discretion, reject any proposed advertising insert/coupon deemed unsuitable for any reason . . . Final approval is contingent upon receipt of finished product not later than (10) days before first insertion date." Advertising Agreement (NG 000074) (Attachment 3). Therefore, Nicor Gas, at a minimum, reviewed and approved the Winter Cap solicitation form before sending it to its customers.

The Winter Cap program solicitation form Nicor Solutions contracted with Nicor Gas to insert within Nicor Gas's customers' bills included the sentence: "[b]y enrolling in the Winter Cap program, you authorize Nicor Solutions to cancel any Customer Select agreement you may currently have." See Exhibit 1 to Second Amended Complaint. The Commission's Staff has previously commented that this disclosure was likely inadequate to inform customers as to what they were actually agreeing to by saying:

> because the only reference to authorization to terminate service with a customer's alternative supplier is in fine print at the bottom of the enrollment form, and only makes reference to Customer Select rather than 'your supplier', I suspect that some customers are unaware that enrollment in Winter Cap could result in termination of service with their supplier.

Iannello Affidavit at 6. By virtue of the Advertising Agreement, Nicor Gas reviewed and approved of this language despite knowing that it was certain to obtain customers who received gas supply from AGSs. Furthermore, Nicor Gas admitted that Nicor Solutions asks it to switch the gas suppliers of Winter Cap customers who receive their gas service from an AGS. *See* Nicor Gas Motion To Dismiss at 2, fn. 2. The Commission can only conclude from the 221 instances where Nicor Gas switched the gas suppliers of Winter Cap program customers from AGSs to itself at Nicor Solutions' behest that they had an agreement or arrangement within the meaning of Section 7-101(3) to do so.

As these facts show, Nicor Solutions simply did not decide on an independent basis to "limit" the Winter Cap program to Nicor Gas customers. Thus, Nicor Solutions has failed to rebut CUB's allegations that it and Nicor Gas had an agreement to switch Winter Cap program customers' gas suppliers to Nicor Gas in a deceptive manner in violation of Section 7-101(3). *See e.g.* Second Amended Complaint at ¶¶24, 43.

II. The Commission Can Assert Its Jurisdiction Over Nicor Solutions and Find It Liable for Violating Sections 8-501 and 9-250 of the Act by Piercing the Corporate Veil between It and Nicor Gas as Stated in Counts IV and V of the Second Amended Complaint

The Commission also can assert its jurisdiction over Nicor Solutions and find it liable for violating Sections 8-501 and 9-250 of the Act by piercing the corporate veil between it and Nicor Gas. Nicor Solutions, through the Winter Cap program, is acting as the mere instrumentality of Nicor Gas. If the Commission declines to pierce the corporate veil, then it will sanction a fraud.

a. Under Illinois Law, the Commission Can and Should Disregard the Separate Existence of Nicor Solutions from Nicor Gas

The Commission can and should disregard the separate existences of Nicor Solutions and Nicor Gas because Nicor Solutions acted as a mere instrumentality of Nicor Gas during the Winter Cap program. Illinois law justifies piercing the corporate veil between the two affiliates in this circumstance.

Nicor Solutions argues that CUB seeks "a drastic measure that may only be entertained reluctantly and only upon a substantial showing." Motion at 11. It goes on to argue that CUB has not met this burden. *Id*.

However, the Illinois Supreme Court has held that courts will disregard the separate corporate identity of one corporation and treat it as the alter ego of another 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." *Main Bank of Chicago v. Baker*, 86 Ill. 2d 188, 205 (1981). The Illinois Supreme Court has also held that piercing the corporate veil is not just limited to the parent-subsidiary relationship; it can apply to an affiliate-affiliate relationship as well. *Id*. at 205. Here, Nicor Solutions and Nicor Gas are affiliated subsidiaries of a common parent, Nicor Inc. *See* Second Amended Complaint at ¶¶3, 34; s*ee also* Nicor Inc. 2003 SEC Form 10-K/A. Moreover, the Commission has also disregarded the separate existence of an affiliate of a utility in the past. *See Ill. Bell Tel. Co and Sprint/United Mgmt. Co., Pre-existing Agreement for Calling Name Data Base Access Service* ("*Sprint Caller ID*"), 1997 Ill. PUC LEXIS 530 (Sept. 2 1997). For these reasons, the Commission can properly pierce the corporate veil between Nicor Solutions and Nicor Gas under Illinois law.

b. Under the Winter Cap program, Nicor Solutions Acted As a Mere Instrumentality of Nicor Gas

Under the Winter Cap program, Nicor Solutions acted as a mere instrumentality of Nicor Gas under the Winter Cap program. A number of facts demonstrate how Nicor Solutions did so. Besides switching Winter Cap program customers' gas supplier to Nicor Gas, Nicor Solutions and Nicor Gas are affiliated subsidiaries of a common parent corporation, Nicor Inc. *See* Second Amended Complaint at ¶¶3, 34; s*ee also* Nicor Inc. 2003 SEC Form 10-K/A. As a result, Nicor Solutions and Nicor Gas share common shareholders.

Also, according to Nicor Gas, the two affiliates share several high level employees, including three out of four members of Nicor Solutions' Executive Committee and four out of Nicor Solutions' six officers. Nicor Gas Response to CUB DR 1.20, 1.21 (Attachments 4-5). Besides sharing Executive Committee members and officers, Nicor Solutions uses the Nicor trademark to market the Winter Cap program and contracted with Nicor Gas to insert the Winter Cap solicitation and enrollment form into Nicor Gas customers' bills. *See* Second Amended Complaint at ¶35-36. Customers enrolling in the Winter Cap program returned their enrollment forms to Nicor Gas who also collected the charges for the program and fielded telephone-billing inquiries on Nicor Solutions' behalf. *Id*. at ¶¶37-38; Nicor Gas Response to CUB DR 1.07 (Attachment 6).

In addition to these significant linkages between Nicor Solutions and Nicor Gas, Nicor Solutions signed, on March 1, 2003, an operating agreement with Nicor Gas. *See* Attachment 7, 2003 Operating Agreement, ICC Docket No. 00-0537 (August 12, 2003). Pursuant to that Agreement, Nicor Gas agreed to make: "management and administrative personnel available to assist Solutions in the conduct of its business." *Id*. at 2. More importantly, Nicor Gas agreed to provide Nicor Solutions with "strategic planning" as well. *Id*. at 3. Curiously, Nicor Gas

disavowed the March 1, 2003 operating agreement during this litigation. *See* Attachment 8, Compliance Report, ICC Docket No. 00-0537 (February 5, 2004). All of these many facts, taken together, show that Nicor Solutions likely did not act at arms' length with its affiliate, Nicor Gas, which is a factor courts consider when determining whether or not to pierce the corporate veil between two entities. *See Logal v. Inland Steel Indus., Inc.*, 209 Ill. App. 3d 304, 309 (1st Dist. 1991).

Nicor Solutions claims that CUB's allegations relate merely to "authorized conduct" that cannot form the basis of any cause of action. *See* Motion at 12 (*citing Lanier v. Associates Finance, Inc*., 114 Ill. 2d 1 (1986)). Nicor Solutions claims that it has the right "to limit the sale of its non-regulated service to any group of customers it chooses." *Id*. (*citing Peoples Energy Corp. v. Ill. Commerce Comm'n*, 142 Ill. App.3d 917, 930 (1st Dist. 1986)).

However, *Lanier* does not allow the companies to interfere with the rights of customers to use the gas supplier of their choosing. Also, the holding in Lanier is explicitly limited to actions "*specifically authorized* by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States." 114 Ill. 2d at 17 (*quoting* Section 10b(1) of the Consumer Fraud Act) (emphasis added). Nicor Solutions has not identified, and CUB has not been able to find, in what proceedings the Commission specifically approved any affiliate contract or arrangement regarding switching the gas suppliers of Winter Cap customers from AGSs to Nicor Gas, let alone one that permits Nicor Solutions and Nicor Gas to do so deceptively. Furthermore, *Peoples Energy* simply does not does not state that a company can "limit" deceptively or slam a customer's utility service provider. The Commission has previously ruled that switching deceptively a customer's utility service provider is an unjust and unreasonable practice in violation of Sections 8-501 and 9-250 of the Act. *See* Final Order,

Citizens Util. Bd. v. Ill. Bell Tel. Co. (Ameritech Ill.), ICC Docket No. 00-0043, (Jan. 23, 2001) ("*Simplifive*"); Final Order, *MCI Telecomm. Corp. v. Ill. Bell Telephone Co.*, ICC Docket Nos. 96-0075 & 96-0084 (cons.), at 21 (Apr. 3, 1996). For these reasons, the Commission can properly conclude that Nicor Solutions acted as a mere instrumentality of Nicor Gas.

c. <u>If the Commission Declines to Pierce the Corporate Veil between Nicor Solutions and Nicor Gas, It Will Sanction a Fraud</u>

If the Commission declines to pierce the corporate veil between Nicor Solutions and Nicor Gas, it will sanction a fraud. As the Staff has pointed out, the enrollment form for the Winter Cap program likely did not disclose adequately in plain language the fact that enrollment resulted in having customers' gas suppliers switched to Nicor Gas. Iannello Affidavit at 6. These customers have suffered real harm by losing their choice of gas supplier and being unable to return to an AGS for a year. Also, competing AGSs have suffered harm as well, because Nicor Solutions and Nicor Gas did not choose to compete with them on the basis of lower cost or better service to regain any lost customers. Instead, Nicor Solutions and Nicor Gas chose to compete using deceptive means. Nicor Solutions and Nicor Gas have essentially committed a fraud on the retail residential gas supply market. For these reasons, the Commission must disregard Nicor Solutions' separate existence from Nicor Gas and find that Nicor Solutions violated Sections 8-501 and 9-250 of the Act when it participated in the slamming of Winter Cap program customers' gas suppliers.

III. The Commission Can Assert Its Jurisdiction Over Nicor Solutions As an AGS and Find It Liable for Violating Section 19-115 of the Act as Stated in Count VI of the Second Amended Complaint

Alternatively, the Commission can assert its jurisdiction over Nicor Solutions as an AGS and find it liable for violating Section 19-115 of the Act as stated in Count VI of the Second Amended Complaint. Moreover, the Commission can do so despite the fact that it has not

certificated Nicor Solutions as an AGS because it still meets the definition of an AGS through its actions.

a. The Commission Can Find Nicor Solutions in Violation of Section 19-115 Without First Certificating It As an AGS

The Commission can find that Nicor Solutions violated Section 19-115 of the Act without having first certificated it as an AGS. The definition of an AGS does not require that the Commission certificate it as such.

Nicor Solutions argues that the Commission cannot regulate it as an AGS because it has not been certificated as one. Motion at 2 (*citing* Sept. 2 Tr. at 52-53). However, the definition of an AGS, contained within Section 19-105 of the Act, does not require AGSs to receive certification from the Commission. Section 19-105 states in relevant part:

> "Alternative gas supplier" means every 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, and shall include affiliated interests of a gas utility, resellers, aggregators and marketers.

220 ILCS 5/19-105. Nowhere within that definition does it state that an AGS must first obtain a certificate in order to act as an AGS. Indeed, many AGSs operate in the state of Illinois without such a certificate, a fact that the Staff recognizes. *See Annual Report on the Development of Natural Gas Markets in Illinois*, July 2004 at 15 (" . . . most [alternative gas] suppliers serve large volume customers and, hence, are not certified by the Commission."). Therefore, Nicor Solutions can be an AGS without receiving a certificate from the Commission.

However, Nicor Solutions should have obtained a certificate from the Commission before providing its services to *residential* customers, pursuant to Section 19-110 of the Act. Section 19-110 states in relevant part:

> (a) The provisions of this Section shall apply only to alternative gas suppliers serving or seeking to serve residential or small commercial customers and only to the extent such alternative gas suppliers provide services to residential or small commercial customers.
> (b) An alternative gas supplier must obtain a certificate of service authority from the Commission in accordance with this Section before serving any customer or other user located in this State.

220 ILCS 5/19-110. Nicor Solutions admits it does not have a certificate from the Commission, despite the fact that it marketed its Winter Cap service to residential customers. Motion at 2. The Commission should not permit Nicor Solutions to use its failure to apply for a certificate to shield its violations of Section 19-115 from scrutiny.

If the Commission adopts Nicor Solutions' position that an AGS must apply for a certificate from the Commission *prior* to subjecting itself to Commission jurisdiction, then it will permit AGSs simply to opt out of oversight at their choosing. In other words, an AGS could market, sell, and bill residential customers for services, but not be subject to any Commission oversight if the AGS simply chose not to apply for a certificate. This would be analogous to an unlicensed driver proclaiming himself exempt from the traffic laws by virtue of not possessing a valid drivers' license. Such a result is clearly at odds with the purpose of this part of the Act, which promotes competition and consumer protection in the residential natural gas market. Thus, the Commission cannot accept Nicor Solutions' interpretation of the Act because it would create an absurd result. *See Mich. Ave. Nat'l. Bank*, 191 Ill. 2d at 504.

b. Nicor Solutions Meets the Definition of an AGS

Nicor Solutions meets the definition of an AGS by "furnishing gas" within the meaning of Section 19-105. Again, Section 19-105 states in relevant part:

> "Alternative gas supplier" means every 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, and shall include affiliated interests of a gas utility*, resellers, aggregators and marketers.

220 ILCS 5/19-105 (emphasis added). When interpreting this statutory language, the Commission should afford it "the fullest, rather than the narrowest, possible meaning to which it is susceptible." See *Lake County Bd. of Review*, 119 Ill. at 423. 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). Using this popular definition, "furnishing of gas" includes 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. According to its own pleadings, Nicor Solutions markets and sells what it calls a billing service. Motion at 4. Also, the Commission cannot overlook the fact that Nicor Solutions, not CUB, chooses to tie that service to the provision of gas from its affiliated utility, Nicor Gas, as a condition of enrolling in the Winter Cap program.

Nicor Solutions argues that it does not furnish gas within the meaning of the statute. *Id*. at 9. But, Nicor Solutions has offered no alternative definition of "furnishing of gas" for the

Commission to consider. Nicor Solutions cannot have the Commission interpret "furnishing of gas" to mean, "for sale, lease, or in exchange for other value received." Indeed, the Commission itself stated "[a] court should avoid a construction that renders part of the statute superfluous or meaningless." Order on Rehearing, *Midwest Generation Energy Services, LLC*, ICC Docket No. 02-0740 at 17 (June 26, 2003) (*citing Bonaguro v. County Officers Electoral Bd.*, 158 Ill. 2d. 391 (1994)). 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 Mich. Ave. Nat'l Bank*, 191 Ill. 2d at 503-504. *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).

In contrast to Nicor Solutions' argument, CUB has offered an interpretation of Section 19-105 that appropriately addresses Nicor Solutions and its Winter Cap program without going further to capture a hypothetical software firm or the United States Postal Service as Nicor Solutions argues. Motion at 9. Neither the hypothetical software firm nor the United States Postal Service are choosing to tie the use of their services to the provision of gas service, unlike Nicor Solutions. Thus, the Commission can accept CUB's reasonable interpretation of the Act to find jurisdiction.

c. <u>Nicor Solutions Violated Section 19-115 of the Act</u>

Once the Commission asserts its jurisdiction over Nicor Solutions as an AGS, it must conclude that Nicor Solutions violated Section 19-115 of the Act. Section 19-115 states in relevant part:

> (f) An alternative gas supplier shall comply with the following requirements with respect to the marketing, offering, and provision of products or services:

> (1) Any marketing materials which make statements concerning prices, terms, and conditions of service shall contain information that adequately discloses the prices, terms and conditions of the products or services.
> (2) Before any customer is switched from another supplier, the alternative gas supplier shall give the customer written information that adequately discloses, in plain language, the prices, terms, and conditions of the products and services being offered and sold to the customer.

220 ILCS 5/19-115(f). Moreover, the Commission has held that "[f]ull disclosure of all applicable prices, terms, and conditions is crucial in a market that only recently came to enjoy the benefits of competition." *See* Final Order, *In re Santanna Natural Gas Corp.*, ICC Docket No. 02-0441, at ¶89 (Nov. 7, 2002).

CUB's Second Amended Complaint alleges sufficient facts to support its allegation that Nicor Solutions has violated Section 19-115. *See* Second Amended Complaint at ¶¶4-28. Nicor Solutions violated Section 19-115 in two principal ways: 1) it failed to disclose adequately in plain language material information about the prices, terms, and conditions of its Winter Cap program credit mechanism and 2) it failed to disclose adequately in plain language that enrollment in the Winter Cap program results in having the customers' AGS switched to Nicor Gas.

Discovery has confirmed that Nicor Solutions has *never* paid a single cent to Winter Cap program customers in credits against their gas bills, contrary to its promise of "protection from high gas prices." *See* Second Amended Complaint at ¶19; Nicor Gas Response to CUB DR 1.14 (Attachment 9) and Solicitation and Enrollment Form; *and* Exhibit 1 to Second Amended Complaint. For these reasons, the Commission can conclude that CUB pled sufficient facts to support its allegation that Nicor Solutions violated Section 19-115.

IV. Jurisdiction and Nicor Solutions' Request for an Interim, Appealable Order

CUB has shown *supra* that the Commission has jurisdiction over Nicor Solutions under any of CUB's three theories of liability. Moreover, both the ALJ and the Commission have previously entered orders concluding that the Commission does have jurisdiction over Nicor Solutions such that it can hear CUB's complaint. *See* ALJ's April 30, 2004 Order and the Commission's June 29, 2004, Order Denying Nicor Gas and Nicor Solutions' Joint Petition for Interlocutory Review. These orders satisfy the requirements of *Ryburn v. People*, 811 N.E.2d 1209 (2004), which Nicor Solutions cites as support for its request for an order that addresses jurisdiction. Motion at 17.

CUB takes no further position with regard to Nicor Solutions' request for an interim order except to note two things. First, the ALJ has recently denied a similar request. See ALJ's August 20, 2004 Order Denying the Joint Request for a Final and Appealable Written Order of Nicor Solutions, L.L.C. and Northern Illinois Gas Company. Second, if the Commission grants Nicor Solutions' request, the Commission should limit any interim order to explaining whatever decision the Commission reaches on Nicor Solutions' Motion. CUB as the plaintiff in this case remains "the master of [its] complaint." *See Reed v. Wal-Mart Stores, Inc.*, 298 Ill. App. 3d 712, 718 (4th Dist. 1998). CUB and its Second Amended Complaint define the scope of this proceeding going forward.

Conclusion

WHEREFORE, for the foregoing reasons, CUB respectfully requests the ALJ to deny Nicor Solutions' Motion.

Respectfully Submitted,

By: _____

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