

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Recycling Services (RSI))
)
 -vs-) **04-0614**
)
 The Peoples Gas Light and Coke)
 Company)
)
 Complaint as to Peoples refusing to)
 supply natural gas service as)
 requested by RSI in Chicago, Illinois)

ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

By the Commission:

On October 8, 2004, Recycling Services, Inc. (RSI) (hereinafter referred to as "RSI" or "Complainant") filed a Verified Formal Complaint with the Illinois Commerce Commission ("Commission") against The Peoples Gas Light and Coke Company ("Respondent" or "Peoples") alleging that it had been denied gas service by Respondent and requesting that Respondent provide gas service immediately and further requesting unspecified money damages for Respondent's failure to provide gas service to its facility at 3152 South California Avenue, Chicago, Illinois.

On October 22, 2004, RSI filed a Verified Amended Formal Complaint and a written Motion for an Immediate Order to Provide Gas Service and for Expedited Decision. On November 15, 2004, Respondent filed a Reply to the Motion.

This matter came on for status hearing before a duly authorized Administrative Law Judge ("ALJ") on November 18, 2004. A subsequent status hearing was held on January 20, 2005. On January 18, 2005, Respondent filed a written Motion requiring the parties file written testimony. RSI filed a written response to this Motion. The ALJ denied the Motion at the January 20, 2005 status hearing.

On January 31, 2005, Respondent filed a Motion for Summary Judgment contending that as of January 26, 2005, gas service was being provided to RSI and the Commission lacked jurisdiction to award money damages to RSI. RSI filed a written response to the Motion for Summary Judgment and Respondent filed a further reply. On February 16, 2005, the ALJ issued his ruling stating that

the Commission has no authority to award damages, but may determine whether Respondent violated various sections of the Illinois Public Utilities Act ("Act"). Thereafter, on February 17, 2005, Respondent filed a Motion in *Limine* requesting that the evidence in this matter be limited only to issues of service lines and that evidence concerning gas mains and easements other than service easements be barred. Complainant did not file a response as required under 83 Ill. Adm. Code 200.190(e).

On April 12, 2005, an evidentiary hearing was held. Both RSI and Respondent were represented by counsel. Respondent's Motion in *Limine* was taken under advisement by the ALJ; however, the ALJ admitted Complainant's Exhibits 1-5 into evidence, which were easements, or other land rights, but were not for service lines. A Joint Stipulation of facts and documents was agreed to by the parties and subsequently made part of the record. RSI presented two witnesses: John Koty, President of Sandman, Inc., the consultant for RSI responsible for project design and development and utility arrangements; and Susan Morakalis, Senior Assistant Attorney for the Metropolitan Sanitary District of Greater Chicago ("MWRD"). Respondent presented three of its employees as witnesses: John Saigh, a Sales Supervisor; Bradley Haas, Manager of Engineering Services; and, Steven Matuszak, Manager of Environmental Affairs. At the conclusion of the hearing on April 12, 2005, the record was marked "Heard and Taken."

The ALJ ordered the parties to file their Initial Briefs on June 3, 2005 and their Reply Briefs, together with any Proposed Orders on July 5, 2005.

A copy of the Administrative Law Judge's Proposed Order was served on the parties on . Briefs on exceptions were filed on August 22, 2005. Reply briefs on exceptions were filed on August 29, 2005.

Complainant's Position

Complainant contends that Peoples lengthy and unwarranted delay in providing service to RSI violated Section 8-101 and 9-241 of the Illinois Public Utilities Act ("Act") (220 ILCS 5/8-101 and 5/9-241), which require Respondent to provide utility service to a customer reasonably entitled thereto without delay and without discrimination.

Complainant contends that there were inordinate delays caused by Respondent in executing the final easement agreement. Complainant asserts that Respondent violated Sections 8-101, 8-404 and 9-241 of the Act by failing to provide gas service to the Property without delay and without discrimination. As a result, Complainant seeks damages, including attorneys' fees, pursuant to Section 5-201 of the Act, from the Respondent for the losses it incurred due to this failure to provide gas service without delay and without discrimination. Complainant contends that it has a statutory and regulatory right to gas service.

Complainant points out that only when faced with a hearing on the complaint, did Respondent enter into a modified version of the MWRD's standard easement agreement. Complainant argued that the Respondent should have routinely signed the MWRD's standard easement agreement as it had in other past easement agreements. Complainant argued that Respondent's refusal to sign the same easement agreement with the MWRD that it has in the past wrongfully caused the delay and was discrimination under Sections 8-101 and 9-241. Complainant argues that the "free access" issue raised by the Respondent was a "pretext" to not providing service to the Complainant. Complainant asserts that Respondent's insistence that it can balk at the terms of an easement to service a single customer which it has signed without qualms for multiple customers is unlawful discrimination against the Complainant.

Complainant argues that the Commission has broad powers to grant the relief requested by the Complainant, citing *Peoples Gas Light and Coke Co. v. Illinois Commerce Commission*, 222 Ill. App. 3d 388, (1st Dist. 1991). The Commission, as an administrative agency has wide latitude to accomplish its responsibilities. *Freedom Oil v. Illinois Pollution Control Board*, 275 Ill. App. 3d 508, 655 N.E. 2d 1184 (4th Dist. 1995). (Other citations omitted) Complainant also cites *Wernikoff v. RCN Telecom Services of Illinois*, 791 N.E. 2d 1195 (1st Dist. 2003) which described the Commission's role in hearing complaints and the Commission's statutory role under Section 5-201. Complainant contends that under the *Wernikoff* decision, court jurisdiction "co-exists" with that of the Commission where the issue involves a violation of the Act. The Complainant requested that the Commission consider its broad authority under the Act, under Sections 4-201, 10-208 and 5-201 so that the Complainant is not left without a remedy where it has a right to service.

Complainant's reconstruction of the events relevant to this case supported by documentation, is as follows. On March 16, 2001, John Koty, President of Sandman, Inc., contacted Respondent, in writing, to request the initiation of new natural gas service on behalf of its client, RSI. The March 16, 2001 letter indicates that all communications should be directed to Sandman, Inc., but that all contacts for purposes of contract development should be sent to Recycling Systems, Inc., 1313 Circle Avenue, Forest Park, IL, attention: Mr. Richard Golf. On March 20, 2001, Peoples responded, in writing, to Mr. Koty, welcoming the request for gas service and indicating that ample gas main facilities would be available for the contemplated gas consumption. Mr. Koty agreed, on behalf of RSI, that it would assume the cost of constructing the gas line from a point approximately thirty (30) feet onto the subject property to its facility, and constructed the line as agreed.

The property upon which the Complainant's facility will be located is owned by MWRD and is leased by Complainant. On September 9, 2001, Mr. Koty, requested that Peoples contact Susan T. Morakalis, Senior Assistant

Attorney with MWRD, in order to begin the process of Peoples obtaining an easement in association with the project.

The project then went through a construction, permitting and zoning phase, where all necessary building and environmental permits were obtained, and construction begun. On September 3, 2003, Mr. Koty sent a facsimile to John Saigh of Peoples. The facsimile notes that while Peoples had provided an estimate of installation costs for the gas service, no easement request had ever been submitted to MWRD. This communication was followed by two additional facsimiles (October 2, 2003 and October 16, 2003) both referencing the need and importance of moving forward on the easement between Peoples and MWRD. On October 27, 2003, Mr. Koty sought additional information about the gas line that was to be installed and suggested the Peoples might wish to coordinate the installation of the gas line with the installation of gas and sewer facilities to avoid redundant costs. Finally, on December 14, 2003, Mr. Koty requested an "absolute date" for Peoples submittal of an easement proposal to MWRD. The communication notes that the original request for service originated on March 16, 2001 and that, to date, no commitment, entrance sketch or request for easement had been forthcoming.

On January 8, 2004, Peoples sent MWRD three originals of a Peoples' prepared easement, with a request that MWRD sign them and return two originals to Peoples. On January 14, 2004, MWRD responded that it utilized its own easement forms and enclosed a copy of the form to be utilized in completing the transaction. On February 7, 2004 and 19, 2004, Mr. Koty contacted Peoples regarding the RSI project, expressing his concern that Peoples, by its actions, was implicitly refusing to provide service to the site.

On March 23, 2004, Mr. Ralph Barbakoff of Peoples wrote a letter to Mr. Koty, which stated that upon Peoples "limited review" of the MWRD form easement it had identified a "number of significant issues" and that "before Peoples Gas devotes additional resources to attempting to fulfill Recycling's request for service, Recycling must agree to pay upfront to Peoples Gas a reasonable sum to cover its legal costs for review and negotiation of the terms of an easement."

On April 2, 2004, Susan Morakalis, Senior Attorney for MWRD, responded to the above-referenced letter. Ms. Morakalis indicated that while Peoples Energy had entered into the MWRD's standard easement form on numerous other occasions, she would attempt to address concerns raised by Peoples. On April 6, 2004, Mr. Koty sent a letter to Peoples, reiterating that MWRD was the property owner that must grant the easement and requesting Peoples to deal with MWRD expeditiously. The letter threatened an appeal to the Illinois Commerce Commission in the event that any additional delays were encountered.

On May 13, 2004, counsel for Peoples, responded to the April 2 letter by proposing numerous revisions to MWRD's draft easement. On May 25, 2004, Ms. Morakalis responded by agreeing to certain changes to MWRD's easement agreement. Further, Ms. Morakalis observed that Peoples position vis-à-vis this matter was "grossly inconsistent" with the standard agreements entered into routinely between Peoples Gas and the MWRD because the service was going to be utilized by a single rate payer. She stated that there was "no legitimate or reasonable access or economic issue that would serve as an impediment to services being delivered to the subject parcel. She asserted that that Peoples' position is contrary to the longstanding understanding between the parties."

On June 17, 2004, counsel for Peoples responded to the May 25, 2004 letter by raising several objections to certain sections of the proposed easement, particularly those dealing with responsibility for environmental damages that might occur in association with the provisioning of gas service. The letter raises additional concerns that Peoples had regarding MWRD's proffered easement agreement. It indicates that upon Peoples' review of its records it determined that "[W]hile Peoples has entered into easements with the MWRD in connection with installing large diameter transmission or distribution lines, the terms of those easement agreements are not relevant here because they reflect a very different use of the property by Peoples." The letter concludes that "it continues to be Peoples position that RSI is not affording it reasonable access to provide gas service."

On June 23, 2004, MWRD responded to the June 17, 2004, letter. The response began by asserting that the environmental clause contained in the easement imposed liability based solely on the actions of and conditions created by Peoples in its operation of the gas pipe. It further noted that the clause is a standard condition found in all MWRD utility easements. The letter then notes that Peoples did not find the terms of prior easements germane to the instant situation because Peoples had not entered into any prior easements to serve a single customer. MWRD responded:

The District currently does not distinguish between easements that serve multiple customers or only one customer. Rather, the District looks at a transaction in terms of whether a utility company will enter its land to install utilities. This last point raised in your June 17, 2004 letter illustrates how Peoples is basing its decisions in this instant matter on the economics of the transaction and not actually on whether reasonable access is being granted.

It is relevant to note that this gas service request has been outstanding for approximately three years. The District has preliminarily approved Peoples easement request and is prepared to present this matter to its Board of

Commissioners for final approval to grant the easement to Peoples at its July 15, 2004 meeting. This matter will be put on the July 15, 2004 agenda by July 1, 2004. If you have any further concerns regarding the easement, please respond hereto prior to that date.

On July 2, 2004, Peoples responded to MWRD's letter by asserting that it would not enter into an easement that contained the environmental terms and conditions contained in the MWRD proposal. On July 6, 2004, MWRD responded to the July 2, 2004 letter by inquiring about the specific objections to the environmental provisions and further questioning Peoples course of conduct in channeling communications through Mr. Koty who, according to MWRD, Peoples knew had no relationship with MWRD. MWRD found this approach "baffling."

On July 15, 2004, MWRD's Board of Commissioners approved the issuance of an easement to Peoples that reflected MWRD's standard Easement Agreement, with various changes made in response to specific concerns raised by Peoples. Also on July 15, 2004, Ms. Morakalis forwarded the MWRD approved Easement Agreement to Ms. Ritscherle for Peoples execution.

On August 24, 2004, Kenneth Capasso, of Althoff Industries, sent a facsimile to Ralph Barbakoff of Peoples, indicating the firm's readiness to install the underground gas piping in association with the project and inquiring as to when the gas meter will be installed and what the gas pressure would be at the time the gas line was activated. Mr. Barbakoff responded on August 26, 2004, indicating that Peoples' response to the inquiries would be made once an easement was granted.

On August 30, 2004, MWRD notified Peoples that RSI was contemplating filing a formal complaint with the Commission and asked Peoples again to advise MWRD about its specific objections to the modified environmental terms and conditions in the easement as it was currently constituted. The communication notes that Peoples had never indicated any specific objections to the provisions. On the same date, Peoples responded that it was not willing to enter into the third party easement agreement for a small diameter gas main. Peoples noted that it believed that the terms of MWRD's proposed easement, even as modified, were onerous and that RSI was not providing it reasonable access to the premises because of the terms of the MWRD easement.

On September 21, 2004, Mr. Koty responded to Peoples August 30, 2004 letter. Mr. Koty began by again stating that this matter had begun over three and one half years ago. By September 9, 2001, Peoples was on notice that it was going to have to enter into an easement with MWRD in order to provide service to RSI, which, as that lessee of property, could not enter into the easement itself. Mr. Koty continued that many of Peoples' responses have referred to the project as the installation of small gas service which, according to Mr. Koty, would lead

to the conclusion that Peoples' gas tariffs allow it to pick and choose its customers within its service territory. Mr. Koty concluded by informing Peoples that it is filing a formal Complaint with the Illinois Commerce Commission over this matter.

On November 15, 2004, Peoples remitted a signed easement for the thirty (30) foot gas main to MWRD for signature. On December 3, 2004, MWRD returned a signed easement to Peoples. Gas service began at the RSI facility January 26, 2005, three years, ten months and ten days after it was first requested.

Respondent's Position

Respondent maintained that it did not violate Section 8-101 of the Act. It provided gas service to Complainant in as reasonably prompt a manner as possible given the facts and circumstances presented in this complaint. Respondent maintained that the Complainant situation is a somewhat unique because Respondent was not dealing with the owner of the Property as the customer. It was also unique that the required installation for the property was a 2-inch service line. Moreover, the MWRD, as Complainant's landlord, insisted upon its standard easement agreement which was not tailored for the provision of a service line to serve a single customer.

On January 8, 2004, Respondent sent its standard easement agreement for a service line to the MWRD. On January 14, 2004, the MWRD rejected that agreement and offered its own standard easement agreement. Respondent maintained that had the MWRD executed Respondent's standard easement agreement, no complaint would have been filed.

Respondent contended that Complainant, not Respondent, had the obligation to obtain the easement from the MWRD. Respondent noted that its tariff, Peoples General Terms and Conditions of Service, Ill.C.C. No. 27, Second Revised Sheet No. 24 (Respondent's Cross Exhibit 1), required the Complainant to provide the Respondent with "free access" to the Property. Mr. Saigh testified that he notified Mr. Koty in March 2001 that it was Complainant's obligation to obtain the easement and free access to the Property in March 2001. He further testified that Respondent installs 2,000 services per year and that the single service line easement request made in the last five years was made by Mr. Koty on behalf of the Complainant. (Tr. 181)

Respondent contended that in the last five years it made 11,000 service line connections and, besides the Complainant's, there were only five other service line easement requests. Mr. Haas provided some detail of those service line easements, Respondent's Exhibits 2-6, and noted that all the parties, except the State of Illinois, executed Respondent's standard service line easement

agreement. Mr. Haas explained that the State of Illinois easement was accepted by Respondent because it was not detrimental to the Respondent. (Tr. 192)

Both Mr. Haas and Mr. Matuszak reviewed Complainant's Exhibits 1-5, the MWRD easements with Respondent, and each noted that in each instance the MWRD easement agreements were not for service lines, but were for large installations serving all of Respondent's customers, such as a transmission line (Complainant's Exhibit 1), soil borings for a regulator station (Complainant's Exhibit 2), a regulator station (Complainant's Exhibit 3), a tunnel under a river (Complainant's Exhibit 4), and a 42-inch main (Complainant's Exhibit 5). (Tr. 193-198 & 236-37) Mr. Matuszak further testified that Complainant's Exhibits 1-5 go back to 1967, 1978 and were at places where Respondent already had facilities worth tens of millions of dollars. Mr. Matuszak explained the history of the five easement agreements with the MWRD. He stated that as these agreements came up for renewal, the MWRD required new environmental provisions. Mr. Matuszak confirmed that the removal of those older mains would cost millions of dollars. For this reason, Peoples agreed to the MWRD required environmental provisions in Complainant Exhibits 1-5. (Tr. 236-237) Mr. Matuszak also noted that service lines, not mains are covered by Respondent's General Terms and Conditions tariff. (Tr. 236)

Respondent contended that the provisions of the MWRD's standard easement agreement were onerous and burdensome. It was only after the MWRD agreed to remove many of the objectionable provisions in the MWRD easement agreement that Respondent executed the agreement. The objectionable provisions, business, operational and environmental, were first outlined by Mr. Barbakoff in a letter to Mr. Koty on March 23, 2004. Mr. Barbakoff stated that the Respondent had several concerns regarding the MWRD standard easement forwarded by Ms. Morakalis on January 14, 2004, including: 1) lack of detail and exhibits; 2) the easement was not perpetual; 3) Complainant needed to provide financial assurances for the financial obligations that Respondent would have to assume; and 4) a full review of the provisions particularly the environmental provisions ("Full Article IX") would be costly and Complainant would have to reimburse Respondent for its legal costs. In addition, Mr. Barbakoff stated that the Respondent was willing to provide service to the Complainant upon the Complainant providing reasonable access. (Joint Stipulation Exhibit 24).

On April 2, 2004, Ms. Morakalis sent a fax letter to Mr. Barbakoff with a revised MWRD Easement Agreement (Joint Stipulation Exhibit 25). Ms. Morakalis responded to certain issues raised by Mr. Barbakoff in his March 23, 2004 letter including: 1) providing an exhibit; 2) offering a 35-year term; 3) offering a nominal \$10 annual easement fee; and 4) stating that the MWRD's intent on the environmental section Full Article IX, was only that Respondent assume its responsibility under the law.

On May 13, 2004, Ms. Ritscherle provided greater detail regarding Respondent's operational and environmental objections to the MWRD standard easement agreement. (Joint Stipulation Exhibit 28) In 20 paragraphs, she detailed Respondent's issues with the latest MWRD easement draft. In paragraph 4, she requested language barring any building over the service and in paragraph 20, she referenced substitute language attached to the letter that would actually provide for Respondent to assume its responsibilities under the law. (Tr. 215-16)

On May 25, 2004, Ms. Morakalis replied to the 20 paragraphs in Ms. Ritscherle's May 13, 2004 letter. The letter stated in paragraph 4 that the MWRD added language barring building over the service, but in paragraph 20 that Full Article IX must stand as originally drafted. She also threatened that if Respondent maintained its position, the MWRD would take a different stance with future easements including significantly raising the cost. (Tr. 240-41) Mr. Matuszak testified that the threat was significant to Respondent because many of the other easements it has with the MWRD that it will need to renew in the future are for significant facilities. (Tr. 248-49)

On June 17, 2004 Ms. Ritscherle responded to Ms. Morakalis' May 25, 2004 letter. (Joint Stipulation Exhibit 30) She detailed Peoples' continued concern with the latest draft. For instance, there still was no prohibition against building over the service as required by the Department of Transportation and Peoples, not the MWRD, would have to decide on the proper design. Most importantly, Peoples continued to object to Article IX.

On June 23, 2004 Ms. Morakalis responded to Ms. Ritscherle's letter. (Joint Stipulation Exhibit 31) She reiterated the MWRD's position on its unwillingness to change Full Article IX because the MWRD does not differentiate on the use of the easement. She stated that the MWRD will change the easement to bar building over the service.

Between June 23 and July 15, 2004, there were various letters between Mr. Koty and Ms. Morakalis and Ms. Elizabeth Ritscherle outlining and attempting to work out various issues raised by the conflicting easement agreements of Peoples and the MWRD (Joint Stipulation Exhibits 32-35). On July 15, 2004, the MWRD approved a draft Easement Agreement that was forwarded under cover letter with the same date from Ms. Morakalis to Ms. Ritscherle. (Joint Stipulation Exhibits 37-38) Ms. Morakalis mentions a change to Full Article IX in the cover letter and the attached draft easement was the first draft where the MWRD made any changes to the environmental provisions. Mr. Matuszak testified that the easement was not acceptable to the Respondent because it still had conditions that were not acceptable. (Tr. 223-24)

Additional attempts were made to conclude an easement agreement between Peoples and the MWRD. On September 14, 2004, a Revised

Easement was sent by Ms. Morakalis to Ms. Ritscherle (Joint Stipulation Exhibit 45). As the fax cover page indicates, three significant changes were made to Article IX ("Revised Article IX"). First, the MWRD removed the term natural gas from the definition of hazardous materials in Article IX, Section 9.01(B)(1). Although Ms. Morakalis testified that as soon as Peoples requested the deletion of natural gas from the definition of hazardous waste the MWRD was prepared to make the change, this was the first easement draft with the change. (Tr. 170-71) Second, Section 9.06 was changed to eliminate certain installation requirements related to containing environmental contamination. Finally, Section 9.08(E) was changed so that Peoples would only need to undertake remediation if the remediation was related to a release of natural gas. The changes eliminated the requirement of Peoples undertaking environmental assessments on the renewal or termination of the easement. (Tr. 228)

Negotiations continued until November 3, 2004 when the MWRD forwarded the easement that the MWRD and Peoples executed. The significant change between the September 14, 2004 and November 3, 2004 drafts was the elimination of a requirement that Peoples report to the MWRD minor gas leaks at the Property. (Tr. 226-27) Respondent executed the Easement Agreement for the Property on November 15, 2004 and the MWRD did so on December 3, 2004. (Joint Stipulation Exhibit 54) On January 26, 2005, gas service was provided to the Property. (Joint Fact Stipulation 58) Mr. Koty testified that prior to turning on the service Peoples performed, at its own cost, a second pressure test on the 1,200 feet of service that RSI had installed. (Tr. 87)

Mr. Matuszak outlined the environmental concerns. He testified that the Full Article IX provisions were onerous because of the inclusion of natural gas in the definitions of hazardous materials and the related investigative and remediation duties that it placed on the Respondent. (Tr. 206-07 & 210) Mr. Matuszak went on to describe the changes made by Ms. Morakalis to the easement agreement first, in her May 25, 2004 letter to Ms. Ritscherle (Joint Stipulation Exhibit 29). Next, after the July 15, 2004 MWRD Board approved the easement agreement, Mr. Matuszak described changes in the environmental provisions. (Tr. 225-226; Joint Stipulation Exhibit 45) Mr. Matuszak described why the changes in the environmental provisions were considered significant. They were significant because of the costs involved in performing Phase I or Phase II environmental assessments due to a leak at the facility and the required remediation of the easement when Respondent vacates the facility. (Tr. 229) Ms. Morakalis acknowledged some of the easement agreement concessions. As examples, Respondent only had to pay a nominal fee rather than the fair market value for the easement; revisions were made to Article IX, the environmental provision; the MWRD agreed not to permit structures over Respondent's utilities; and, Respondent did not have to indemnify the MWRD for negligent acts.

On the issue of a delay in providing service to the Property, Respondent contended that there is no way to determine a reasonable time in which it could

be determined that there was a violation of Section 8-101 of the Act. The easement was a somewhat unique, third-party situation between the Respondent and the MWRD. The MWRD not only insisted upon dealing with the Respondent itself, but also its lease with the Complainant required it. Moreover, the MWRD insisted that its standard easement agreement be executed by Respondent. Respondent contended that the MWRD standard easement agreement was not suitable for a service line easement agreement. Respondent contended that it has the right and the obligation on behalf of all of its customers to negotiate reasonable easement terms. Both sides made concessions so that service could be provided to the Complainant. Respondent contended that the time involved was not unreasonable given that Respondent came to the negotiation table from different perspectives. Respondent viewed the easement issue from the perspective that it was providing a service line to serve a single customer and the MWRD from the perspective of being the protector of public lands.

Respondent contended that a review of the Joint Stipulation clearly indicates that it dealt with the Complainant and the MWRD in good faith. No particular timeline could be established in which an easement agreement should have been executed. Respondent contends that Ms. Morakalis acknowledged that her only other negotiation with Peoples, the 95th Street and the Skyway project (Tr. 166) took a year to resolve itself into an agreement with the Respondent. (Tr. 168)

Respondent contended that the Complainant never provided reasonable notice because it never provided a date when gas service was required. Respondent contended that the Complainant only requested a date when gas was available, but did not indicate a date for completion of the Property facilities. Respondent pointed to the facts that the Complainant did not receive building permits from the City of Chicago until July or August, 2004; water and sewer lines were not in the ground until August 2004; electricity and telephone service to the Property was provided around Christmas 2004, and the Complainant did not occupy its administration building until February-March 2005. (Tr. 116-119) Thus, Respondent contended that aside from the "requirement that Complainant provide 'free access,'" until the Complainant provided a specific date when gas service was required, the Respondent was not obligated under Section 8-101 of the Act to provide service to the Property.

Respondent contended that the Complainant was an applicant for service as defined in 83 Ill. Adm. Code 200.40. Respondent contends that under its tariff, General Terms and Conditions, Respondent's Cross Exhibit 1, Ill.C.C. No. 27, Second Revised Sheet 24, the Complainant was obligated to provide the Respondent with "free access" to the Property and thus the Complainant, not the Respondent was obligated to provide the easement required by the MWRD. Mr. Saigh informed Mr. Koty of the responsibility to provide the easement in March 2001, which Mr. Koty initially accepted, but further advised the Complainant that the Respondent would have to obtain the easement from the MWRD.

Respondent pointed to the fact that Ms. Morakalis acknowledged that the Respondent was provided “free access” only when the parties executed a final agreement on the easement in December 2004. (Joint Stipulation Exhibit 54; Tr. 144) Up until December 2004, the Complainant had not met its legal obligation to provide the free access necessary to install the 2-inch service pipe to the property and the Respondent had no duty to install the service pipe prior to being provided “free access” in December 2004 and had no right to be on the Property.

Respondent argued that it provided service “without delay” to the Complainant in compliance with Section 8-101. Peoples contended that the factual circumstances are somewhat unique for three reasons: 1) Complainant’s landlord, the MWRD, required an easement that was not Respondent’s standard service line easement; 2) the Complainant refused to be responsible for its duty to provide “free access;” and, 3) the MWRD “Standard Easement” agreement was not tailored to providing a service to a single customer, the Complainant. (Tr. 162-163) As indicated by the Joint Stipulation documents, Respondent pointed out that throughout the negotiations between it and the MWRD, they negotiated in good faith. Concessions were made by both parties, and Respondent argues that there is no evidence that the Respondent delayed or refused to provide service to the Complainant.

Respondent further contended that it did not delay in providing service to the Complainant once the final easement was fully executed. Respondent pointed out that the MWRD did not execute the final easement until December 3, 2004 and the service was provided on January 26, 2005. Respondent contended that this short delay was caused by the holiday season, winter weather, and the need for the Respondent to pressure test the Complainant’s own pipe installation. Respondent noted that the Complainant never objected to the time it took to install the service line subsequent to the MWRD executing the easement agreement.

Respondent also stated that it did not discriminate in providing service to the Complainant. There is no evidence showing any discrimination. The lack of discrimination is underscored by the testimony and Joint Stipulation. Moreover, the Respondent contended that if it had executed the MWRD’s “Standard Easement” agreement provided on January 14, 2004, it would, in effect, have discriminated against the other five parties who executed Respondent’s standard service line easement in the last five years.

Respondent contended that the Complainant did not provide any evidence of any other violations of the Act. Specifically, while the Complainant contended in its complaints and opening remarks at the evidentiary hearing that the Respondent violated Sections 8-404 and 9-241 of the Act, no evidence was presented regarding these alleged violations.

Respondent requested that the Commission urge the MWRD to include the revised Article IX language in future "Standard Easement" agreements with the Respondent. Ms. Morakalis indicated that language which barred building over the pipe and those changes made to Article IX were minor for the MWRD, could be made without MWRD Board approval and would still be included in the definition of a MWRD "Standard Easement." (T. 156-59 & 170-71) Respondent requested that in its best interests and those of its customers that the Commission in its final order urge the MWRD to agree to the minor concessions as described by Ms. Morakalis in her testimony, in future land rights documents it grants to the Respondent.

Respondent contended that it has not violated Sections 8-101 and 9-241 of the Act. Respondent contended that the ALJ ruled correctly that the Commission cannot award damages to the Complainant pursuant to Section 5-201 of the Act. Respondent noted that the Complainant failed to cite any Commission orders wherein the Commission awarded damages to a complainant pursuant to Section 5-201 because there are no cases.

As applied to this complaint, Respondent contended that Section 8-101 states that the Respondent is required to provide its service line under the MWRD property easement "without discrimination and without delay." Respondent contended that Complainant provided no testimony or evidence of discrimination under Section 8-101. Respondent contended that the easement agreement was not fully executed until December 2004 and was the result of direct, substantive negotiations where both the Respondent and the MWRD made concessions, many of which were considered substantive by the Respondent. Respondent contended that its single service line easement agreement that was provided to the MWRD in January 2004 was routine and, if signed by the MWRD, no complaint would have been filed. Respondent contended that its tariff required the Complainant, as the applicant for service to provide "free access" to the easement and that "free access" was not provided until the easement agreement was executed and this was acknowledged by MWRD witness Morakalis. Respondent contended that the distinction between providing service to a single customer such as the Complainant and many customers does not amount to discrimination either under Section 8-101 or 9-241 of the Act.

Respondent contended that Section 9-241 of the Act cannot be applied to the instant complaint case. Respondent contended that Section 9-241 applies to rate discrimination between classes of customers, not single line users and many users. Section 9-241 also applies to discrimination between different localities within a utility's service area and so it bears no relationship to the alleged discrimination between the Complainant as a single customer being served through an individual service pipe and mains that serve many customers.

Respondent contended that the Commission lacks statutory and legal authority to award damages to the Complainant. On this issue, the Respondent agreed with the ALJ's ruling on February 16, 2005, that found that the Commission could not award damages. Respondent pointed to three cases in support of its position that the Commission could not award damages, citing *Barry v. Commonwealth Edison Company*, 374 Ill. 473, 29 NE2d 1014 (1940); *Ferndale Heights Utility Company v. Illinois Commerce Commission*, 112 Ill.App. 3d 175, 445 NE2d 334 (1st Dist. 1982); and, *Moenning v. Illinois Bell Telephone Company*, 139 Ill. App.3d 521, 487 NE2d 980 (1st Dist. 1985). Respondent contended that the Complainant could not point to a single case or Commission Order in a complaint matter where the Commission awarded damages. Respondent cited four cases in which the Commission ruled that the circuit court and not the Commission has the authority to award damages under Section 5-201. *People of the State of Illinois v. Illinois Bell Telephone Company*, Docket 88-0127, Order dated October 2, 1991(Commission has no authority to determine or award damages under Section 5-201 rather the authority lies squarely in the courts, at 4); *Patricia Morgan v. Illinois Bell Telephone Company*, Docket 91-0280, Order dated October 23, 1991 (actions for monetary damages under Section 5-201 belong in a court of law, at 1); *Scott Leber v. GTE North Incorporated*, Docket 92-0352, Order dated April 7, 1993 (no showing of actual damages and proper forum for damages is a court of law, at 2); and, *Citizens Utility Board v. Illinois Bell Telephone Company*, Docket 00-0043, Order dated January 23, 2001 (Section 5-201 authorizes redress in circuit court for damages caused by a public utility's acts or omissions that violate laws or Commission regulations or orders, at 5). Respondent contended that the law on this issue has been well settled for twenty years and that the cases cited are on point. Respondent pointed out that the Illinois Legislature has not made a substantive change to what is now Section 5-201 since 1939.

Respondent noted that in the case of *Peoples Gas Light and Coke Company v. Illinois Commerce Commission*, 222 Ill. App. 3d 738, 584 NE2d 341, 343 (1st Dist 1991), the Appellate Court held that the Commission had jurisdiction to interpret the Family Expense Act, the Court held that Peoples Gas did not seek damages, but payment for the service it provided. Thus, had Peoples Gas sought damages, the proper venue would be a civil court, not the Commission. Respondent contended that the Complainant improperly cited the case of *Wernikoff v. RCN Telecom Services of Illinois*, 341 Ill. App. 3d 89, 791 NE 2d 1195 (1st Dist. 2003). Respondent contended that in the *Wernikoff* case, the Court concluded that the Commission had exclusive jurisdiction over rate reparation claims, but that under Section 5-201, courts had jurisdiction over damages. (Id., 341 Ill. App. 3d 94-94, 102, 791 NE 2d 1200, 1205-1206)

Finally, Respondent argued that its Motion In *Limine* should be granted. Respondent contended that testimony and evidence relating to gas mains and concerning land rights for other than service easements are not relevant to the providing of a 2-inch service line to the Property. The provision of service lines is

covered in Respondent's tariffs, Respondent's Cross Exhibit 1. Thus, Respondent sought to bar a substantial portion of Ms. Morakalis' testimony and the admission of Complainant Exhibits 1-5.

Commission Analysis and Conclusions

RSI alleges that Peoples violated Sections 8-101 and 9-241 of the Act because it failed to provide gas service in a timely manner. Section 8-101 reads, in relevant part, as follows:

Every public utility shall, upon reasonable notice, furnish all persons who may apply therefore and be reasonably entitled thereto, suitable facilities and service, without discrimination and without delay.

The relevant section of Section 9-241 provides:

No public utility shall, as to rates or other charges, services, facilities or in other respects, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.

Complainant contends that Respondent violated Section 8-101 by failing to provide gas service to the Complainant's Property "without discrimination and without delay" and Section 9-241 by subjecting it to "prejudice or disadvantage." Complainant first applied for gas service in March 2001 and actively sought service beginning in September 2003 but did not receive service until January 2005. The MWRD and Peoples spent over a year negotiating easement terms for a two inch gas pipe thirty feet long. Complainant contends that Respondent failed to provide gas service without delay and discriminated against the Complainant because it: 1) refused to sign the MWRD Standard Easement Agreement, an easement agreement it had accepted several times in the past; 2) refused to deal directly with the MWRD; 3) took an inordinate period of time to negotiate the easement; and 4) only executed the easement after a formal complaint was filed.

Respondent, on the other hand, focuses on the language in Section 8-101 that only requires Respondent to provide an applicant service when the applicant is "reasonably entitled" to such service. Respondent argues that Complainant was not reasonably entitled to service until it had provided Respondent "free access" as required under Peoples' tariff and that "free access," an undefined term, was not provided until the final easement was fully executed in December 2004.

Peoples contends that if its standard easement agreement had been signed by the MWRD in January 2004, service would have been provided to the Property much earlier than January 2005. Because Peoples had signed off on five MWRD easements in the past, and the MWRD has apparently never executed one of Peoples' standard easements, it is unlikely that Peoples really expected that to happen in this case.

The record indicates that Peoples substantially delayed providing gas service to Complainant. Peoples failed to respond to RSI inquiries and requests for an easement document made in September, October and December of 2003. On January 8, 2004, after four months of requests by RSI, Peoples sent the MWRD its version of an easement.

An MWRD letter dated January 14, 2004 indicated that it wanted to use its easement form, attaching a copy. Peoples then stopped communicating directly with the MWRD and directed all subsequent correspondence to RSI. It persisted throughout the negotiation in addressing all responses to MWRD letters to Complainant's construction manager.

More than two months after receipt of the MWRD easement, on March 23, Peoples finally responded to the MWRD easement letter. Peoples did so by sending a letter to RSI insisting that after "limited review" of the MWRD easement "before Peoples Gas devotes additional resources to attempting to fulfill Recycling's (RSI) request for service," RSI must agree upfront to pay its legal fees in negotiating the easement. Peoples or its attorney reiterated this demand more than once in subsequent correspondence. In a letter dated July 8, 2004, Peoples attorney said RSI could negotiate further if it would "contact Peoples directly to make arrangements to pay the reasonable attorneys fees associated therewith."

At one point Peoples demanded that Complainant assume all of its liabilities for running the gas line under the MWRD property to connect to the line installed on the land leased by RSI.

In February 2004, RSI was planning to install other utilities under the easement area due to be covered soon by a permanent concrete driveway. It wrote and telephoned Peoples to determine when it could install the gas line in order to coordinate the excavation and installation of other utilities. Peoples did not respond, probably because the easement was still outstanding. In June, still waiting for gas service, Coty wrote and explained that the other utilities were being installed and that a concrete driveway was to be poured above them. RSI asked Peoples whether it could insert the gas service line into a steel pipe that RSI was installing for that purpose, over which the concrete drive would be poured. Peoples failed to respond to this inquiry in writing and, according to Coty's un-refuted testimony refused to give him a clear answer over the telephone.

Although the MWRD's correspondence indicates a willingness to compromise on all or almost all of the issues of concern, Peoples was not cooperative. Peoples insisted that its easement be perpetual rather than renewable after a term of years, as it has agreed to in the past. For a substantial period, Peoples insisted on its environmental language rather than a modification of the MWRD language accomplishing similar goals. There is no indication in the record that Peoples or the MWRD negotiators ever made any attempt to meet face to face to iron out any of the difficulties rather than send letters back and forth month after month. Not surprisingly, these long distance negotiations dragged on for about fourteen months.

Respondent argues that although it has executed identical MWRD easements in the past without negotiation or delay, it had legitimate operational, business and environmental concerns in this instance that needed to be addressed before it could execute the easement agreement.

Peoples argues that the other situations where it signed off on the standard MWRD easement without negotiating any language changes are not relevant to this case because in the other instances larger equipment serving many customers was involved. Respondent contends that this economic distinction, which is not articulated in its tariffs, the regulations or the Act, negates RSI's complaints of discrimination and failure to provide service. Respondent contends that no timeline can be applied to the easement negotiations because this was a somewhat unique, one-of-a-kind situation between Respondent, Complainant and Complainant's landlord, the MWRD.

This Commission finds that: 1) the lengthy time periods that occurred between many MWRD letters and Peoples' responses; 2) Peoples demands that RSI assume Peoples' costs and liabilities prior to further negotiation and/or service connection; and 3) its reluctance to compromise or negotiate on several issues fail to indicate an intent to provide service without delay in compliance with the Act.

Respondent contends that Complainant's attempt to shift the burden of providing "free access" to Respondent and force Respondent to enter into the earlier draft MWRD easement violates Peoples' tariff. The Commission finds that Peoples concern over the economic aspects of the transaction rather than a lack of "free access" was a cause of the delay in providing service. Given the facts and circumstances as fully set forth in the preceding sections of this Order and upon review of the Joint Stipulation, the Commission is of the opinion that the Respondent failed to provide gas service to the Property "without delay."

The next issue to be determined is whether Respondent illegally discriminated against the Complainant as an applicant for gas service in violation of Section 8-101 and Section 9-241 of the Act. Most of the delay in providing

service arose from Peoples' unwillingness to sign an easement it has signed several other times because the easement concerned a single line customer rather than for a gas main or other equipment serving many customers. Complainant insists that this is patently discriminatory.

Peoples argues that it had legitimate business concerns because the MWRD agreement is not tailored for a service line, but for larger mains and other gas installations.

Not all discrimination is illegal, to discriminate is to make distinctions. Unlawful discrimination is drawing distinctions in treatment or favor on a basis other than the individual merit of a situation. Case law indicates that it is only unreasonable differences in treatment that are prohibited. *Citizens Utilities Co. v. Illinois Commerce Commission*, 50 Ill. 2d 35, 276 N.E.2d 330 (1971); *Will County Water Co. v. Village of Shorewood*, 117 Ill.App.3d 187, 453 N.E.2d 12 (3rd Dist., 1983). Clearly, Peoples saw economic differences between this situation and those where it signed the easements without negotiation. In its view the benefit of signing the easement in the other cases exceeded its likely cost. In this case the cost benefit analysis did not justify signing the MWRD boiler plate easement. Although the distinction it drew here regarding the number of customers served by the easement is not directly supported by the regulations, Peoples reluctance to sign the form easement was not unreasonable and was not a subterfuge for another unlawful purpose. Therefore, we find it did not violate the anti-discrimination provisions of the Act cited by the complainant.

Peoples argues that the discrimination referred to in Section 9-241 of the Act concerns rates and not service. While we do not agree that this section is limited to rate discrimination, for the reasons stated above we decline to find Peoples has violated this Section of the Act.

Respondent has requested that the Commission urge the MWRD to include the revised Article IX environmental language in future "Standard Easement" agreements with the Respondent. While, we cannot order the MWRD to do so, we encourage the MWRD to include the Article IX concessions in future land rights documents it enters into with the Respondent.

We concur with the ruling of the ALJ that case law and prior Commission orders consistently find that we cannot award money damages.

Based on the foregoing, the Commission concludes that the complaint should be granted in part and denied in part.

Findings and Ordering Paragraphs

The Commission, having considered the entire record herein, and being fully advised in the premises thereof, finds that:

- (1) Respondent, the Peoples Gas Light and Coke Company, is an Illinois corporation, engaged in furnishing natural gas service in the State of Illinois and, as such, is a public utility within the meaning of the Illinois Public Utility Act;
- (2) the Commission has jurisdiction over the parties and the subject matter herein;
- (3) the findings of fact and conclusions of law set forth in the prefatory portion of this Order conform to the evidence of record and the law and are hereby adopted as findings of fact and law herein;
- (4) Complainant shown by a preponderance of the evidence that the Respondent violated the requirement of Sections 8-101 of the Act that it provide service without delay;
- (5) Complainant has failed to demonstrate that the Respondent discriminated against it in violation of Sections 8-101 and 9-241;
- (6) Complainant is not entitled to damages pursuant to Section 5-201 of the Illinois Public Utilities Act (220 ILCS 5/5-201);
- (7) all motions, petitions and objections made in this proceeding should be disposed of consistent with the ultimate conclusions contained herein;
- (8) based on the Findings (4),(5), and (6), the subject Complaint is granted in part and denied in part.

IT IS THEREFORE ORDERED that the Verified Complaint and Verified Amended Complaint filed by Recycling Services, Inc. on October 8 and October 22, 2004, respectively, against The Peoples Gas Light and Coke Company, be, and is hereby granted in part and denied in part.

IT IS FURTHER ORDERED that all motions, petitions and objections made in this proceeding which are not disposed of, be and are hereby disposed of consistent with the ultimate conclusions contained herein.

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

DATED: August 8, 2005

BRIEFS ON EXCEPTIONS DUE: August 22, 2005

REPLIES ON EXCEPTIONS DUE: August 29, 2005

Terrance Hilliard
Administrative Law Judge