

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Citizens Utility Board and AARP)	
)	
)	
vs.)	
)	No. 08-0175
Illinois Energy Savings Corp., d/b/a U.S. Energy Savings Corp.)	
)	
)	
Complaint as to marketing practices in Chicago, Illinois)	

**CITIZENS UTILITY BOARD’S RESPONSE TO
USESC’S MOTION TO STRIKE OR IN THE ALTERNATIVE
BAR ADMISSION OF TESTIMONY OF BARBARA R. ALEXANDER**

NOW COMES the Citizens Utility Board (“CUB”), through its counsel, Julie L. Soderna, and hereby responds, pursuant to the Commission Rules of Practice (“Rules”), 83 Illinois Administrative Code Section 200.190, to Respondent’s Motion to Strike or in the alternative to Bar Admission of Testimony of Barbara Alexander (“Motion to Strike”). Respondent, Illinois Energy Savings Corp. d/b/a U.S. Energy Savings Corp. (“Respondent,” “USESC” or the “Company”), filed its Motion to Strike on September 22, 2009.

I. INTRODUCTION

This proceeding was initiated upon the filing of a complaint by CUB, AARP and Citizen Action¹ (“Complaint”), collectively referred to as “Consumer Groups,” or “CG.” Under the CU Act, CUB is charged with the responsibility of “ensuring effective and democratic representation of utility consumers” and “providing for consumer education on utility service prices.” 220 ILCS 10/2. In that role, CUB operates a consumer hotline, where CUB Consumer Counselors

¹ Citizen Action was dismissed from the proceeding on November 17, 2008.

answer questions regarding utility service and mediate disputes with utilities, competitive retail energy suppliers and telecommunication service providers. CUB reviews trends in complaint volume and type of allegations to trigger management review and determine whether more formal action, such as this complaint case, is warranted. As a result, CUB relies on the volume and nature of complaint patterns to raise a “red flag” with respect to further actions on behalf of consumers beyond merely using its good faith efforts to solve the consumer’s immediate problem.

From January 1, 2007 through September 30, 2008, CUB received 1,900 complaints regarding USESC, which is more than twice the complaints for all the other alternative energy suppliers combined. CUB Ex. 5.0 at 2-3, LL. 53-60. The extraordinary volume and egregious nature and circumstances evident in CUB’s complaint records regarding USESC, including unauthorized switches, non-English speakers who were switched without understanding the product, (*see* CUB Ex. 2.0 at 5, LL. 102-104), and various forms of misrepresentation of USESC and its product, (*see* Complaint), caused CUB to file the instant Complaint. CUB and AARP jointly presented the testimony of Barbara Alexander, a consultant specializing in consumer utility issues including complaint analysis, to present an analysis of CUB’s complaint records and to closely examine the Company’s marketing activity in Illinois.

Respondent now seeks to have certain portions of CUB-AARP witness Barbara Alexander’s testimony stricken from the record or, in the alternative, to bar admission of such testimony into evidence at the hearing. Respondent argues that portions of Ms. Alexander’s testimony constitutes inadmissible hearsay, lacks foundation and consists of speculation, and constitutes “findings of fact” and legal conclusions reserved for the ALJ. *See* Motion to Strike.

The Motion must be denied for the following reasons, each of which is discussed in detail in Section II below.

First, as Barbara Alexander is a foremost expert on consumer utility issues, her testimony is well within the boundaries of her experience and the law². The Commission's Rules of Practice ("Commission's Rules) specifically allow evidence not otherwise admissible in civil cases "if it is of a type commonly relied on by reasonable prudent persons in the conduct of their affairs," (83 Ill. Admin. Code Part 200.610). Ms. Alexander is clearly an expert in utility complaint analysis and CUB's complaint records are the type of evidence she routinely reviews in her profession. Thus, allegations that Ms. Alexander lacks foundation are baseless.

Second, because CUB's consumer complaints are business records, and therefore exempt from the general rule against hearsay, they are properly relied upon by Barbara Alexander. Even if the Commission were to determine that the statements within CUB's complaint records are hearsay, Illinois courts have held that administrative hearings do not presume hearsay to be inadmissible evidence.

Third, since the Company possesses each one of the CUB consumer complaint forms relied upon by Ms. Alexander, filed rebuttal testimony responding to her testimony, and supplied evidence of the Company's own complaints, it cannot now claim that Ms. Alexander's testimony is somehow fatally flawed, or its own similar testimony must also be stricken.

Finally, USESC's Motion to Strike is neither appropriate nor timely in violation of Part 200.680 of the Commission's Rules. 83 Ill. Admin. Part 200.680.

² Although Ms. Alexander's curriculum vitae is attached to her Direct Testimony as Exhibit 1.01, it is attached again here for the ALJ's convenience.

II. ARGUMENT

A. BARBARA ALEXANDER'S EXTENSIVE EXPERIENCE EXAMINING CONSUMER UTILITY ISSUES PROVIDES SUFFICIENT FOUNDATION FOR HER TESTIMONY

Illinois courts have made clear that the decision whether to admit expert testimony is within the sound discretion of the trial court. *Thomson v. Gordon*, 221 Ill. 2d 414, 428 (2006), citing *Snelson v. Kamm*, 204 Ill. 2d 1, 24 (2003). “A person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its conclusions.” *Id.*, citing *People v. Miller*, 173 Ill. 2d 167, 186 (1996). The testimony of Barbara Alexander is well within the boundaries of her experience, consisting of a wide range and extensive history of expert testimony on consumer-related issues before over 15 state commissions, and the law. Ms. Alexander served as Director of the Consumer Assistance division at the Maine Public Utilities Commission for 10 years and there implemented a utility complaint tracking database, which she “relied upon to provide testimony before the Commission concerning utility compliance with the Commission’s consumer protection regulations.” CG Ex. 1.0 at 4. Ms. Alexander has since developed a consulting practice directed to consumer protection, customer service and low-income issues, and in that role has provided testimony before over 15 state regulatory commissions on a diverse array of consumer issues.³ CG Ex. 1.0 at 1, LL. 17-21. There can be little doubt of Ms. Alexander’s qualifications in utility complaint analysis.

³ Most recently, in response to a complaint filed by the Delaware Public Service Commission, Ms. Alexander provided very similar testimony to that submitted here. In the Delaware proceeding, Ms. Alexander testified that a retail electric supplier, named Horizon Power & Light LLC, terminated customer contracts prematurely, engaged in misrepresentation, and enrolled customers without permission, among other things. PSC Docket No. 355-08. In July 2009, the Delaware Commission approved a Settlement Agreement that requires the following: Horizon Power and its two principal owners to pay \$500,000 for the benefit of affected customers; **Horizon to cease doing business in Delaware; and Horizon “admits that its conduct led to the filing of Staff’s complaint and that its conduct has caused it to cease its Delaware operations.”** *Id.*, Order No. 7626 (emphasis added).

When the context of Ms. Alexander's questioned testimony is examined in light of the facts and evidence at issue, in concert with her extensive experience in analyzing consumer complaints, the assertion she lacks foundation for certain statements is absurd. For example, USESC claims Ms. Alexander lacks foundation for her comment that "even a relatively small number of complaints can provide a valuable signal because customer complaints reflect only the 'tip of the iceberg.'" Motion to Strike at 4, *citing* CG Ex. 1.0 at 4-5, LL. 90-94, 705-708. First, this is a general comment that does not even explicitly discuss USESC complaints. Second, Ms. Alexander's statements reflect the obvious conclusion that there are customers in addition to those whom have complained about USESC, for example, who may have had unsatisfactory experiences with USESC and did not complain to CUB or other third parties. This statement reflects Ms. Alexander's expertise in consumer complaint analysis, as well as basic common sense.

In another example of USESC's objection as to lack of foundation, Ms. Alexander responds to testimony presented by USESC witness Findley, who discusses several of CUB's complaint records and presents her own conclusions about the pattern of USESC's own complaint analysis. CG Ex. 2.0 at 8; USESC Ex. 2.0 at 4-5, LL. 91-98; 6, LL. 131-138; 7-8, LL. 147, 180. As noted in Ms. Alexander's testimony, the statements to which USESC objects seek to rebut the Company's testimony regarding CUB's and USESC's own complaints. If Ms. Alexander's testimony is inadmissible hearsay, then these portions of Ms. Findley's testimony must also be stricken.

Other challenged statements include Ms. Alexander's summaries of her conclusions and organization of her testimony. CG Ex. 1.0 at 151-171; CG Ex. 2.0 at 39-44. Ms. Alexander discusses the evidence she relied on – her evaluation of USESC's discovery responses, relevant

publicly available documents, and CUB's complaint records – in her Direct Testimony. CG Ex. 1.0 at 3, LL. 58-64. Additionally, Ms. Alexander describes the specific factual bases for her comments or conclusions at length in the body of her testimony. For example, Ms. Alexander's disputed testimony that “[d]uring 2007, USESC knew that it was training sales agents to sell a product that has almost no chance of resulting in savings to residential customers” is substantiated in the testimony preceding that statement. There, Ms. Alexander recounts the timeline and substance of information available to the Company that drew her to the now-challenged conclusion. CG Ex. 1.0 at 21, LL. 429-431. USESC probed the bases for this statement in discovery, and – again — is free to further question the bases for Ms. Alexander's statement on these issues on cross-examination. See Attachment B, CUB's response to USESC data requests 5.4-5.8

In response to a close examination of USESC's sales and training materials, as well as CUB's complaint records, Ms. Alexander concluded that the Company does not, in fact, market its product as the insurance-type product that it is, or promote it as providing “peace of mind,” as USESC purports in its training materials. CG Ex. 1.0 at 13, LL. 253-54. USESC challenges this statement based on an alleged lack of foundation. The basis for this statement is clearly demonstrated, however, in Ms. Alexander's analysis of CUB's complaint records, which is discussed at length in Part II of her Direct Testimony. *See* CG Ex. 1.0 at 20-27. Here, again, Ms. Alexander's expertise in consumer issues and complaint analysis, in addition to her in-depth review of hundreds of CUB complaint records and other relevant materials, appropriately supports the analyses and conclusions in her testimony.

Other conclusions challenged by USESC as lacking foundation are substantiated by surrounding testimony and most importantly, by her special expertise in examining consumer

regulatory matters. See CG Ex. 1.0 at 15, LL. 322-26; 16, LL. 322-26; 15-16. LL. 330-34. As pointed out above, Ms. Alexander possesses a unique and expansive resume, having worked for the Maine Public Utilities Commission for 10 years and testifying frequently before numerous state commissions, including this Commission. The questioned statements are therefore within her experience and qualifications, as required by Illinois courts. *People v. Miller*, 173 Ill. 2d 167, 186 (1996). The probative value of Ms. Alexander's statements and the weight to be attributed to them, will be determined by the ALJ and the Commission in their evaluation of this record.

USESC's objection to certain statements as consisting of "improper legal conclusions" should also be ignored. Motion to Strike at 5, 8, 10-11. This testimony is supported by facts, is within Ms. Alexander's scope of knowledge and expertise and is therefore admissible. For example, the Company objects to Ms. Alexander's testimony that certain contractual language is "misleading." CG Ex. 1.0 at 26, LL. 523-526; 32, LL. 654-658. The referenced testimony, however, explains the basis for each statement. Further, the term "misleading" is not used as a term of art, but merely as a factual description of how this expert views the referenced material from a consumer perspective. Likewise, her comment that the early termination fee is "designed to punish customers who discover that they have in fact paid a very high price for natural gas supply compared to their local utility" is prefaced by the phrase "in my opinion." CG Ex. 1.0 at 30, LL. 611-612. Ms. Alexander's comment is within the scope of her expertise as in consumer utility issues. USESC witness Potter himself testified that USESC charges customers damages for premature cancellation in order to allow it to pay its suppliers. USESC Ex. 1.0 at 13-14, LL. 290-309. Ms. Alexander's use of the term "punishment" merely presents the issue from the

consumer's point of view. Essentially, this is a debate about semantics and in no way represents a legal conclusion.

B. BARBARA ALEXANDER'S TESTIMONY DOES NOT CONSTITUTE HEARSAY AND IS ADMISSIBLE IN ITS ENTIRETY

USESC claims that Ms. Alexander's testimony about CUB's complaint records constitutes impermissible hearsay or double hearsay. Motion to Strike at 2. Respondent bases much of its Motion to Strike on the premise that the Commission's Rules generally prescribe that civil rules of evidence apply to Commission proceedings. Motion to Strike at 1. Although Respondent is correct that the Commission's Rules specify that the rules of evidence applied in Illinois civil courts also applies to Commission proceedings, (83 Ill. Admin. Code Section 200.610), Respondent remarkably failed to cite to the entirety of this rule, and in fact omitted the portion of the rule that is not only applicable to, but also warrants rejection of Respondent's request. The portion of the rule omitted by USESC states that "evidence not admissible under such rules may be admitted *if it is of a type commonly relied on by reasonable prudent persons in the conduct of their affairs.*" 83 Ill. Admin. Code Part 200.610 (emphasis added). In accordance with this rule, Ms. Alexander properly relied upon CUB complaints in conducting her analysis and drawing conclusions that certain patterns of allegations were revealed by the complaints. In fact, this is the type of evidence she routinely reviews in her profession. As shown above, there can be no question about Barbara Alexander's credentials as a consumer utility expert witness.

Notably, the Company does not take issue with Ms. Alexander's Exhibits 2.1 and 2.4, which contain the actual complaint records of 21 and 28 consumers, respectively. Nonetheless, as the Company itself acknowledges, these documents are properly admissible as business records. Motion to Strike at 4. The foundational requirements for business records are found in Illinois Supreme Court Rule 236(a):

Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term "business," as used in this rule, includes business, profession, occupation, and calling of every kind.

In *Bachman et al. v. General Motors Corporation, et al.*, the Illinois Appellate Court for the Fourth District of Illinois found that certain complaint forms were admissible under the business records exception to the hearsay rule. 332 Ill. App. 3d 760. There, the court reasoned that,

Supreme Court Rule 236(a) requires only that the party tendering the record satisfy the foundation requirement by demonstrating that the record was made in the regular course of a business at or near the time of the transaction. 145 Ill. 2d R. 236(a); *Progress Printing Corp. v. Jane Byrne Political Committee*, 235 Ill. App. 3d 292, 305, (1992). “[A]ll other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility.” *Lecroy v. Miller*, 272 Ill. App. 3d 925, 935-36, 651 N.E.2d [*790] 617, 624, 209 Ill. Dec. 439 (1995), quoting 145 Ill. 2d R. 236(a); see also *Raithel v. Dustcutter, Inc.*, 261 Ill. App. 3d 904, 909, 634 N.E.2d 1163, 1167, 199 Ill. Dec. 809 (1994) (Cook, J., specially concurring) (A business can prove up records of another business which it has in its possession if it verified those records).

Id. at 789-790. The court determined that the testifying witness (Nunan) was (1) familiar with General Motors’ records and procedures regarding the reports and (2) the data at issue was retrieved and kept in the normal course of the investigation. *Id.* Additionally, the court determined that the information was recorded “rather promptly” in the regular course of

business. For all these reasons, the court concluded that the threshold requirement for admission under the business records exception was satisfied. *Id.*

In this case, Ms. Marcelin's testimony more than substantiates the foundation requirement – and the second prong of *Bachman* – by demonstrating that the CUB's complaint records are made in the regular course of a business at or near the time of the transaction. *See Bachman*, 332 Ill. App. 3d 760, 789. CUB witness Sandra Marcelin testified as to how CUB's Consumer Rights Counselors ("Counselors") are trained to handle and record complaints, as well as record-keeping procedure concerning the complaints. CUB Ex. 2.0 (Corrected) at 2-7. Ms. Marcelin testified that CUB Counselors record each consumer call in an internally created and maintained electronic database. *Id.* at 2. Each Counselor is individually trained with regard to relevant Commission rules, database entry, the effect of pending cases on consumers, and CUB policy positions on various issues. *Id.* at 5. Each Counselor also receives CUB's "Data Entry Guidelines for Consumer Database" for use as a ready reference for basic data entry guidelines (this document is attached to Ms. Marcelin's direct testimony as CUB Exhibit 2.2). Additionally, Ms. Marcelin testified that counselors "record the complaint in the database either simultaneously with the phone call or shortly thereafter, and all records are kept in the access database." *Id.* at 7. CUB's complaint records are clearly kept in the normal course of CUB's responsibility as consumer advocate.

Ms. Alexander demonstrated her familiarity with CUB's records and procedures regarding the complaint records, thus satisfying the first prong of *Bachman*. Ms. Alexander testified that not only is she familiar with CUB's complaint recording process, but also that she believes "the information is highly reliable since it is gathered at the point of contact with the consumer and often includes quotations from the consumer or reflects the customer's own

words.” CG Ex. 1.0 at 3-4, LL. 68-77. The particular challenged testimony reflects Ms. Alexander’s analysis of hundreds of CUB complaint records, as well as volumes of the Company’s own responses to data requests. *Id.* at 3, LL. 58-61. Ms. Alexander draws conclusions based on the totality of her review of all of this information and summarizes it in her testimony, citing to portions of the records for illustration and emphasis. *Id.*

Even if USESC is correct that the statements within CUB’s complaint records constitute hearsay under civil rules of evidence, Illinois courts hold that administrative hearings do not presume hearsay to be inadmissible evidence. *City of Hurst v. Illinois Commerce Commission*, 120 Ill. App. 3d 354 (5th Dist. 1983), *see also Nussbaum Trucking Inc. v. Illinois Commerce Com.*, 99 Ill. App. 3d 741 (2nd Dist. 1981). The fact that the Administrative Law Judge reviews the admissibility of alleged hearsay evidence, while also being the trier of fact, abrogates the purpose of excluding hearsay, *i.e.* preventing the jury, as trier of fact, from seeing that evidence. *Id.* The treatise McCormick on Evidence is instructive in the instant case:

Many reasons support the open admission of hearsay and other legally incompetent evidence in administrative hearings. Foremost among them is the fact that the exclusionary rules do not determine the probative value of the proffered evidence. Professor Davis, the leading proponent that hearing officers should make no distinction between hearsay and nonhearsay [sic] evidence, makes the point this way. “[T]he reliability of hearsay ranges from the least to the most reliable. The reliability of non-hearsay also ranges from the least to most reliable. Therefore the guide should be a judgment about the reliability of particular evidence in a particular record in particular circumstances, not the technical hearsay rule with all its complex exceptions.” To require that a trial examiner refuse to admit hearsay makes no sense where there is no jury to protect and the trier of fact is equally exposed to the evidence whether he admits or excludes it...Hearsay, of course, is not subject to current, in court cross-examination, but that limitation affects the weight the evidence carries, not its admissibility.

McCormick, Evidence, § 350, 841-42 (2nd ed.1972). Therefore, any allegations that CUB’s complaint forms are hearsay are simply irrelevant to whether the portions of Ms. Alexander’s

pre- filed testimony that rely on such evidence are admitted into the evidentiary record. Moreover, USESC will have ample opportunity to cross-examine Ms. Alexander at the evidentiary hearing and probe the veracity and reliability of the Ms. Alexander's testimony regarding CUB's complaint records.

Finally, the Company's own witnesses describe interactions with customers in support of its contention that, rather than being misled, certain customers are simply "remembering wrong." Mr. Nicholson, with 20 years of experience in various forms of sales and now a Distributor for USESC, discusses one interaction with a customer who called the sales office to complain about USESC's product. USESC Ex. 3.0 at 6-7, LL. 130-141. It turns out that Mr. Nicholson was the agent that had signed up this supposed customer. *Id.* Not surprisingly, Mr. Nicholson concludes that it was the *customer* – and *not* Mr. Nicholson – who had made the error in misunderstanding the USESC product. *Id.* Mr. Nicholson hardly qualifies as an expert in consumer complaints and provides no documentation in support of his statement. If any testimony constitutes hearsay and warrants being stricken, it is this testimony. Likewise, Ms. Findley presents testimony purportedly showing that certain complaints were "untrue," and uses quotes from CUB's complaint records to substantiate her point. USESC Ex. 2.0 at 4-5, LL. 91-98; 6, LL. 131-138; 7-8, LL. 147, 180. Thus, if Ms. Alexander's testimony regarding CUB's complaint records is inadmissible hearsay, then so is the referenced testimony of Mr. Nicholson and Ms. Findley.

C. THE COMPANY'S OBJECTIONS AS TO RELEVANCE SHOULD BE REJECTED

Since the Company possesses each one of the CUB consumer complaint forms relied upon by Ms. Alexander, filed rebuttal testimony responding to her testimony, and supplied evidence of the Company's own complaints, it cannot now claim that Ms. Alexander's testimony

is somehow fatally flawed, or its own similar testimony must also be stricken. If the Company wanted to challenge the statements in CUB's complaint records, it could have requested subpoenas from the Commission to either depose or call as an adverse witness each and every individual upon whose complaints Ms. Alexander relied, because the Company was served all of CUB's unredacted complaint records, including the customers' names and addresses, in July 2008. See 83 Ill. Admin. Part 200.360, 200.625. The Company declined to do so⁴. Instead, in his rebuttal testimony, USESC witness Gord Potter himself cites to and attaches a summary of complaint statistics from the Public Utility Commission of Texas and the Ontario Energy Board to purportedly undermine Staff's and CUB's complaint analyses. USESC Ex. 5.0 at 13-15, LL. 298-335; USESC Ex. 5.5. Aside from the unreliability of this proffered data⁵ and the irrelevance of USESC's performance in other states⁶, by seeking to introduce its own version of complaint data in rebutting Ms. Alexander's and Staff witness Agnew's testimony regarding CUB's and the Commission's complaints, the Company is in effect demonstrating the probative value of such evidence.

While USESC claims Ms. Alexander's testimony regarding the financial and operating structure of the Company and its corporate parent is irrelevant, at the same time the Company itself submits testimony seeking to substantiate its performance in other states. USESC Ex. 5.0 at 13-15, LL. 298-335. USESC criticizes Ms. Alexander's statements regarding its operations as not relating to an allegation regarding "customers in Canada, New York or Indiana." Motion to

⁴ Obviously, such a course is impracticable, for the same reasons that CUB did not call hundreds of consumer lay witnesses to appear in this proceeding. Nor can this possibly be what is required to demonstrate a violation of the Act or no party, Commission Staff included, could substantiate a case based on consumer complaints.

⁵ Those statistics should be ignored by the Commission because they do not provide any detail of the circumstances or allegations in the complaints themselves – only aggregate numbers of complaints presented in some sort of "ranking" in relation to business activity. This "evidence" should be given little weight as it has no relevance to the issues before this Commission, and is not put forth by a competent witness who could describe the record keeping of the respective agency.

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Strike at 6. USESC misconstrues Ms. Alexander's testimony on this matter. In her Direct Testimony, Ms. Alexander does not speak to customers' experience with USESC, only its financial and operational structure as a corporation. CG Ex. 1.0 at 13-14, LL. 264-282. USESC witness Potter, on the other hand, *does* proffer testimony regarding USESC performance in other states. If any portion Ms. Alexander's testimony regarding CUB's complaint records is stricken as impermissible hearsay, then so too should the Commission strike Mr. Potter's Rebuttal Testimony regarding complaint statistics from the Public Utility Commission of Texas and the Ontario Energy Board. USESC Ex. 5.0 at 13-15, LL. 298-335; USESC Ex. 5.5.

USESC further claims that statements in Ms. Alexander's rebuttal testimony regarding a proceeding in the state of New York are irrelevant. In that testimony, Ms. Alexander cites to a recently-entered "Assurance of Discontinuance with the New York Attorney General, in which USESC agreed to lower exit fees, a 30-day cancellation window, background checks for its sales agents, and other reforms that are similar to those USESC is now claiming it initiated in Illinois due to its own analysis of complaints." CG Ex. 2.0 at 16-17, LL. 320-25. Ms. Alexander introduces this testimony for the limited purpose of refuting statements in Mr. Potter's Rebuttal Testimony, claiming that the Company changed its exit fee on its own initiative. USESC Ex. 5.0 at 30-31, LL. 687-714. Put in its proper context, this testimony has sufficient foundation and is admissible.

Finally, the Company's own witness provided almost identical testimony to that it seeks to have stricken as a legal conclusion. Mr. Steven Hames testified that the number of complaints regarding USESC does not indicate a pattern of fraud by contractors. USESC Ex. 4.0 at 6, LL. 118-126. He further testifies as to whether he believes USESC's sales practices confuse or mislead customers. *Id.* at 6, LL. 127-130. The vast majority of Mr. Hames' experience is not as

a complaint analyst, but in car sales. *Id.* at 1, LL. 8-10. It is these bald assertions, and not Ms. Alexander's, which lack foundation and constitute speculation.

D. THE MOTION TO STRIKE IS NEITHER APPROPRIATE NOR TIMELY

USESC's Motion to Strike is neither appropriate nor timely in violation of Part 200.680 of the Commission's Rules. 83 Ill. Admin. Part 200.680. By waiting until virtually the eve of trial to file its Motion to Strike, after having much of the complained-of testimony in its possession for over one year, the Company seriously prejudices CUB's ability to prepare its case for evidentiary hearing. The original trial date for this proceeding was set for March 3, 2009. The parties agreed to request a continuance on February 24, 2009, in order to explore settlement discussions. *See* Joint Motion to Continue Hearing, Feb. 24, 2009. The Company did not file a Motion to Strike Ms. Alexander's testimony in anticipation of the March 3rd trial date, or any time before that. Instead, the Company filed Mr. Potter's rebuttal testimony, which attempted to refute many of the same conclusions it now states are inadmissible. *See* USESC Ex. 5.0.

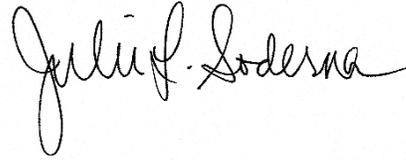
As demonstrated above, USESC's arguments are meritless and reflect a basic misunderstanding of and misinterpretation of the relevant law regarding expert testimony. Thus, the Motion to Strike is both inappropriate and untimely in contravention of the Commission's Rules and should be denied.

WHEREFORE, CUB respectfully requests that the ALJ deny the Motion to Strike in its entirety. If the Commission determines that certain portions of Ms. Alexander's testimony should be stricken as hearsay or improper legal conclusions, CUB respectfully requests the Commission strike similar testimony of USESC witnesses, as identified above.

Respectfully submitted,

Dated: October 6, 2009

CITIZENS UTILITY BOARD

A handwritten signature in black ink that reads "Julie L. Soderna". The signature is written in a cursive style with a large initial 'J' and a long, sweeping underline.

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