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 AND AARP
INITIAL BRIEF

PUBLIC

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Dated: December 7, 2009

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CITIZENS UTILITY BOARD AND AARP'S
INITIAL BRIEF

NOW COMES the Citizens Utility Board ("CUB") and AARP, through their counsel, pursuant to 83 Illinois Administrative Code Sections 200.800 and the schedule adopted by the Administrative Law Judge ("ALJ"), hereby submit their Initial Brief in the above-captioned proceeding. This proceeding was initiated upon complaint of CUB and AARP ("CUB/AARP") under the Public Utilities Act ("PUA") and concerns allegations by CUB/AARP that USESC has violated the PUA and other laws through its conduct as a competitive alternative gas supplier ("AGS"). The allegations herein relate to conduct that occurred from January 1, 2007 through December 31, 2008. CUB/AARP respectfully request the Illinois Commerce Commission ("Commission" or "ICC") exercise its authority under the PUA and revoke the certificate of convenience for licensed alternative gas supplier U.S. Energy Corp., to put an end to marketing abuses and management failures responsible for harming thousands of Illinois consumers.

I. INTRODUCTION AND SUMMARY OF THE CASE

The evidence in this proceeding demonstrates unequivocally that Illinois Energy Savings Corp., d/b/a U.S. Energy Savings Corp.[1], ("USESC" or the "Company"), an Alternative Gas Supplier ("AGS") operating in Illinois pursuant to a certificate of service authority granted by the Commission, has substantially and repeatedly violated the Alternative Gas Supplier Law ("AGSL"), 220 ILCS 5/19-110-115. The practical implication of these violations is that Illinois consumers were harmed by being taken advantage of, misled, and slammed, and as a result paid far in excess of what they otherwise would have paid the utility by hundreds or even thousands of dollars. In this Initial Brief, CUB/AARP will document the evidence that supports the alleged violations and demonstrate to the Commission that strong action is required to uphold the Commission's authority under the Public Utilities Act. CUB/AARP summarizes their case below.

USESC won certification as an Illinois alternative natural gas supplier in 2003, after assuring the Commission it had the necessary financial and managerial experience to serve Illinois consumers and pledging it would abide by all federal, state, regional and industry rules. The Company promised that its marketing materials would adequately disclose the "prices, terms and conditions of the products and services being offered" and that written materials in "plain language" would convey that information to customers.[2] The company asserted it had a managerial chain of command, on the ground in Illinois, to oversee operations and to insure compliance with all Commission rules and guidelines.[3]

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[1] The Company now does business as Just Energy, but because it was known as U.S. Energy throughout the majority of this proceeding, CUB/AARP will use "USESC" to describe the Company throughout this brief.

[2] See Application of Energy Savings (Illinois) Corp. for Certificate of Service Authority under Section 19-110 of the Public Utilities Act (November 17, 2003), Docket No. 03-0720, pages 4-5.

[3] See Energy Savings (Illinois) Corp. Schedule 21 B, Organizational Chart, submitted in this docket as CG Exhibit 2.6,

Six years later, it has become abundantly clear that USESC's request for certification contained mostly empty promises to the Commission and to Illinois consumers. Rather than providing honest, straightforward information about its products, the evidence in this case dramatically shows that USESC has engaged in a pattern of abusive, misleading and often fraudulent marketing of its very expensive fixed-term natural gas supply contracts. That marketing has deliberately preyed on consumers' fears of rising natural gas prices and targeted the most vulnerable in society—low-income, non-English speaking and elderly consumers desperate to find ways to lower their monthly gas bills.

Both CUB and the Commission's own Consumer Services Division ("CSD") presented evidence documenting the unprecedented volume of consumer complaints lodged with each agency by USESC customers, a volume of complaints that far exceeded the total number received for all other alternative natural gas suppliers combined. And, after several months of denying the existence of any system for tracking its own customer complaints, USESC finally revealed that its own data mirrors that of CUB and the ICC, with the company itself logging a total of 5,630 complaints during 2007 and 2008. A large portion of those complaints alleged various forms of misrepresentation by sales agents.

However, it is not just the enormous number of complaints that is troubling, but the clear pattern of marketing abuses the complaints highlight, abuses such as:

- USESC sales agents promising customers would save money by switching their gas supply.
- Sales agents claiming the USESC fixed price plan would protect customers from future utility rate increases.
- USESC switching gas supply without proper customer authorization.

- Sales agents claiming they represent Nicor, Peoples Gas, the ICC or some other independent agency or organization not affiliated with USESC.
- Misleading or not fully disclosing the exorbitant fees charged for early termination of the USESC contract.
- Agents taking advantage of non-English speaking or elderly customers who did not understand the transaction. [4]

Throughout this case, USESC has tried to paint the vast majority of these complaints as unfounded allegations from disgruntled customers who either do not understand how the natural gas market works or wanted out of the contract when they saw their bills skyrocket. But the company's own data—again data which USESC insisted did not exist—shows the Company itself confirmed *1,730 valid customer complaints of misrepresentation by 268 different sales agents* over just a two-year period. Despite this remarkable level of its own customer complaints, the Company maintains that it does a good job of communicating its product to potential customers. In fact, only a handful of those contractors were ever penalized for their actions. One contractor, Mr. William Nicholson, who testified in this case, was even promoted, despite his record of confirmed cases of misrepresentation while a sales agent.

The evidence presented in this case, and confirmed by the Company's own customer complaint data, shows USESC turns a blind eye to the marketing abuses of its sales agents. But this lack of oversight cannot be seen as accidental. The Company has exercised little control over Illinois operations in an attempt to shield itself from responsibility for any problems that occur. The Company hides behind the paper contract and verification call. Both Staff of the Illinois Commerce Commission ("Staff" or "ICC Staff") and CUB/AARP witnesses agree that

[4] CG Ex. 1.0, p. 2- 3.

no piece of paper or phone call can supersede the influence of the sales agent on the porch. The vast majority of individuals involved in selling the USESC product or training and managing the sales force in Illinois are independent contractors who *work solely on commission.* This set up is obviously ripe for abuse because the compensation of the very individuals charged with enforcing ethical sales and marketing practices is dependent on the kinds of unethical practices that increase sales volumes.

Misleading and fraudulent marketing is so rampant at USESC because the door-to-door sales method chosen by USESC is 1) prone to high pressure sales, 2) inherently complaint provoking, and 3) very difficult to supervise. In many cases, no amount of disclosures in either the contract or the verification call can undo the influence of the salesperson on the front porch. The Company at least recognizes these problems, but then blames its complaint rate on sales volume. Yet, the Company's sorely lacking supervision of its sales force demonstrates its willful ignorance of addressing such problems.

Further aggravating the general problems with door-to-door sales model is the fact that the product USESC offers is inherently a bad deal. The Company's "Price Protection Program" offers to lock in natural gas prices for a period of four to five years, unlike other suppliers in Illinois who offer one to two-year terms. During the years at issue in this case, that price was almost always significantly higher than the price being charged by the regulated gas utilities and often higher than the highest-ever prices reached in Illinois. The pattern of complaints documented by CUB, the ICC Staff and even the Company itself shows that USESC sales agents routinely misled customers into believing they would save money by locking prices in for that length of time.

The sad fact is, however, that the vast majority of customers who entered into those long-term contracts are likely to pay more by the end of the contract than they would if they had stayed with the regulated utility. And, the Company's exorbitant early termination fees – which, despite the new law, remain in effect for those existing contracts – make it impossible for many customers to exit their contracts. As a result, USESC's misleading marketing practices have led to customers being strangled with higher natural gas bills. Because the Company's marketing efforts target communities with large low-income, minority, non-English and elderly speaking populations, it is the consumers who can least afford it that are being hit the hardest by USESC's wrongdoing.

In addition to considering how USESC's actions have harmed consumers, CUB also recommends the Commission examine how the Company has conducted itself during the two years this docket has been underway. USESC has gamed the Commission's rules and practices by stonewalling on legitimate requests for information and denying that key pieces of information, such as the Company's very detailed compliance database, even existed. Similarly, for months the Company insisted that it had no prior knowledge of the locations its sales agents were marketing in—a statement offered as proof the Company was not targeting specific communities—only to finally acknowledge that advance emails with the locations are sent to the various utility companies every week.

As the Commission is aware, the current complaint is the second such action CUB has taken against USESC. In April, 2006, CUB filed a complaint with the Commission alleging similar abuses. That case was settled after the Company agreed to certain changes in its marketing activities. Yet, just two years later, the same pattern of misleading and fraudulent activities continued. And, during the current case, while embroiled in its second complaint

before the Commission, along with litigation brought by the Illinois Attorney General in court, the complaints from consumers continued to flood not just CUB, but the ICC and the Better Business Bureau ("BBB"), as well.

As the evidence presented in this case clearly shows, USESC simply cannot be trusted to clean up its own act. The Company has had numerous chances to change course and has failed to do so. That is why CUB/AARP urge the Commission to take the following actions to protect Illinois consumers:

- Revoke the company's certificate of service authority, or, in the alternative;
- Prevent USESC from marketing, selling or otherwise entering into contracts with Illinois customers until an independent audit of the company's management and oversight of its marketing and sales activities has been completed;
- Assess penalties for violations of the Alternative Gas Supplier Law; and
- Prevent USESC from charging any early termination fees for its contracts in Illinois that were entered into after January 1, 2007.

CUB/AARP understand that these remedies are serious and we do not make these recommendations lightly. But hundreds of thousands of Illinois consumers have been subjected to USESC's misleading and fraudulent marketing practices with no end in sight. Only stern action from the Commission will end these practices. Only this Commission can wipe out the blight USESC has become on the Illinois competitive energy landscape.

II. STATEMENT OF FACTS

This proceeding was initiated upon complaint of CUB and AARP[5] (collectively referred to as "CUB/AARP," "Consumer Groups," or "CG"), alleging that USESC violated the following Illinois laws: Article XIX of the Illinois Public Utilities Act, the Alternative Gas Supplier Law ("AGSL"), (83 Ill. Admin. Code § 5/19-100 et seq.); the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/2); the Illinois Deceptive Trade Practices Act (815 ILCS 510/2); the prohibition against unreasonable liquidated damages; and the Supplier Standards of Conduct within the utility tariffs of Peoples Gas Light & Coke Company ("Peoples" or "PGL"), North Shore Gas Company ("North Shore" or "NS"), and Northern Illinois Gas Company d/b/a Nicor Gas Company ("Nicor"), collectively referred to herein as "Utilities." See Verified First Amended Complaint.

The conduct upon which the allegations in CUB/AARP's Complaint are based includes, among other things, unauthorized switching (referred to as "slamming" herein), customers told they would save money by switching to USESC, customers told they would avoid upcoming rate increases, customers told the USESC representative represented the utility, CUB, or the ICC; customers told USESC was part of a government program to protect people from rising gas prices; customers told they were signing a petition to lower heating bills; and customers not informed about the material terms of the contract, including the contract length and sizeable termination fees.

USESC is an affiliate of Canadian-based Ontario Energy Savings Corp. USESC applied for its certificate of convenience as an alternative gas supplier ("AGS") with the Commission on November 17, 2003 in ICC Docket No. 03-0720. In its application, USESC sought to market to

[5] Citizen Action/Illinois was dismissed from the proceeding on November 17, 2008 and CUB/AARP filed a Verified First Amended Complaint on December 3, 2008 in accordance with the ALJ's November 17, 2008 Ruling.

customers of Nicor, Peoples, and North Shore. The application did not disclose any details about the types of products that would be offered or the mode of marketing that would be employed to solicit natural gas supply service to customers in Illinois. In its application, USESC pledged to uphold all federal, state, regional and industry rules, practices policies, procedures and tariff relating to the interstate natural gas system, provide service to residential customers as set forth in 83 Ill. Admin. Code 551.20(b), comply with any informational and reporting requirements that may be established by the Commission, and comply with all other applicable laws and regulations and Commission rules and orders, as described in 83 Ill. Admin. Code 551.20(d); *see* ICC Docket 03-0720, USESC Application. The Commission granted its certificate of convenience on December 17, 2003. USESC began marketing in the Chicago metropolitan area in early-mid 2004. Tr. at 526/8; Ex. 1.0 at 2, LL. 42-43.

USESC is an affiliate of U.S. Energy Savings Corp., which is in turn an affiliate of Ontario Energy Savings Corp., which is indirectly 100% owned by the Energy Savings Income Fund ("ESIF")[6]. USESC markets throughout much of Canada and also Illinois, Indiana, New York and Texas. According to press releases and public reports filed by ESIF, the Fund performed "successfully in 2007" and provided a special distribution to its unit holders. CG Ex. 1.0 at 14, LL. 276-280. Earnings increased substantially in 2008 fiscal year and unit distributions increased 60% compared to the prior year; this was in the face of an admitted increase in attrition of its customer base. CG Ex. 1.0 at 14, LL. 276-280, citing ESIF's Annual Report, Management's Discussion and Analysis, May 15, 2008 at 14. USESC is serving more residential customers than any other supplier in Illinois. IESC Ex. 5.0 at 17, LL. 287-88.

[6] It appears that all these entities are now under the corporate name "Just Energy Corp." (Tr. at 72/2 (Hames))

In Illinois, USESC markets almost entirely through door-to-door sales, using independent contractors as sales agents, rather than employees. Tr. at 79/5 (Hames). Sales agents receive no salary. Tr. at 78/18-21 (Hames). They are compensated entirely on commission and other incentives. Ex. 3.0C at 4, LL. 86-87. USESC's Illinois customer base has hovered around approximately 100,000 customers for the last several years, 90% of whom are residential consumers. CG Ex. 1.0 at 12, LL. 245. USESC sells mostly long-term fixed-price natural gas supply contracts consisting of four or five years in duration. Tr. at 402/19 (Potter).

Historically, USESC has had four to five regional offices in the Chicago metro area, which are each managed and operated by one Regional Distributor, who is also paid entirely on commission. IESC Ex. 5.0 at 7, LL. 146-150. Regional Distributors are responsible for recruitment, interviewing, and training of sales contractors. *Id*. Regional Distributors also conduct sales meetings and presentations, oversee the continuing development of sales contractors, implement directives from the CCR group and the Sales and Marketing department, and handle day-to-day office issues. *Id*.

There are currently 130 sales agents operating in Illinois. *Id*. at 5.0 at 6, LL. 144. Each sales office also has several crew coordinators, who "have a contract with ESMC to provide contractor-related marketing services and who have gained experience such that they have been asked by ESMC to assist with the coordination of crews of contractors." CG Ex. 1.0 at 16, LL. 312-14, *citing* USESC data request response to CSD 5.01. Each crew coordinator oversees about 10 sales contractors. Tr. at 135/5 (Hames). Until recently, the Company had no permanent, salaried sales manager in Illinois. The only salaried USESC employee residing in Illinois – at least until June 2009 – was the Regulatory Manager, Mr. Charles Ianello, who has since been

promoted to Director of Regulatory and lives in Springfield, Illinois. Tr. at 399/15 (Potter). Mr. Ianello does not supervise or oversee day-to-day sales office operations.

USESC operates as an AGS in the Nicor Gas Customer Select program pursuant to Nicor Riders 15 and 16, filed with the Commission pursuant to Final Orders in Docket Nos. 00-0620 and 00-0621 (consolidated)(July 5, 2001). USESC also operates as an AGS in the Peoples Gas and North Shore Gas service territories pursuant to Peoples Riders AGG and SVT, and North Shore Riders AGG and SVT filed with the Commission pursuant to Final Order in Docket No.01-0470 (March 5, 2002) and the Final Order in Docket No. 01-0469 (March 5, 2002). In Docket Nos. 00-0620 and 00-0621, the Commission opened the Illinois gas market to AGSs by approving Nicor's Customer Select gas choice program tariffs, but emphasized that "[i]t is important for customers, particularly less sophisticated customers to have the ability to easily evaluate service offers from alternative suppliers." ICC Docket Nos. 00-0620, 00-0621, Order at 65 (July 6, 2001).

CUB, as part of its operation as a consumer advocate, pursuant to 5 ILCS 10/1, receives and responds to individual consumer inquiries and complaints regarding utility service. The individuals in CUB's call center, "Consumer Rights Counselors," document each customer contact[7] in a database with a "CUB Consumer Inquiry" file, that includes the name and contact information for each consumer, as well as a summary of the conversation between the consumer and CUB representative. Each file is assigned an individual ID Number. Corrected CUB Ex. 2.0 at 5, LL. 123-125. Where the submission was received via email or letter, the information is entered in the database verbatim. With respect to telephone contacts, CUB Consumer Rights Counselors are trained to summarize the key points of the consumer's issue in a way the captures

[7] CUB receives customer contacts via phone, fax, online, email or by regular mail. Corrected CUB Ex. 2.0 at 3, LL 68-69.

all of the relevant information necessary to resolve the complaint. See CUB Ex. 2.2. CUB's Consumer Advocacy staff periodically meets to discuss various issues relating to CUB's consumer contacts. Corrected CUB Ex. 2.0 at 4, LL. 83-87.

AARP is a nonprofit, nonpartisan membership organization that advocates for people age 50 and over, seeking to promote their independence, choice and control in ways that are beneficial and affordable to them and to society as a whole. AARP operates in all 50 states as a social welfare organization. It has about 1.8 million members who reside in the State of Illinois. AARP maintains a membership list by state. AARP reviewed a sample of CUB's complaints regarding USESC, in which over one-third were associated with AARP Illinois members. Verified First Amended Complaint at ¶ 16.

CUB tracks utility and supplier rate information in a tool on its website, called the Gas Market Monitor ("GMM"). See CUB/AARP Ex. 1.2. The GMM also provides a monthly snapshot of how consumers have fared with hundreds of supplier plans. *Id*. The GMM calculates savings or losses based on an average customer's usage, comparing the supplier's offered rate to the utility's regulated rate (the "Purchased Gas Adjustment" or "PGA"). *Id*. CUB estimates a typical customer's usage to be 1,325 therms and allocates those therms for each month based on the ICC's gas usage data. *Id*. As of October 12, 2009, CUB calculated that 99% of USESC's plans had resulting in customer paying more than they would have otherwise paid to the utility, in some cases thousands more. CUB Cross Ex. 15.

CUB filed a complaint against USESC in April 2006 ("2006 CUB Complaint"), where it similarly alleged USESC slammed consumers and failed to adequately disclose the prices, terms and conditions of service. See ICC Docket No. 06-0337, Complaint. The 2006 CUB Complaint was resolved by a confidential settlement agreement and release between the parties, whereby

certain customers who believed they were misled into signing a fixed price gas contract were allowed to cancel contracts without exit fees and receive a refund, and USESC agreed to change certain business processes, including the sales brochure, the contract, and training manual. Tr. at 694 at 14 (Potter). Despite these changes, CUB continued to see elevated complaint levels, and in fact, experienced an increase in complaints in 2007. Tr. at 791/6 (Gendusa-English). The Company even acknowledged in this proceeding that despite instituting "very new processes" in 2007, it could not identify a specific decrease in the number of complaints during that time. Tr. at 695/20 (Potter). In fact, the Company itself acknowledged an increase of complaints into 2008. Tr. at 696/21 (Potter).

CUB filed the instant Complaint after receiving an unprecedented number of complaints – over 1,500 – from January 1, 2007 through March 2, 2008, when the complaint was filed. By the end of 2008, that total had risen to 1,917 complaints (since January 1, 2007). CUB Ex. 9.0 at 2, LL. 26. The total complaints CUB received for all other ARGs combined during 2007 and 2008 was only 835. CUB Ex. 9.0 at 2, LL. 27. In the course of the proceeding, it was discovered – and uncontested – that the Company itself documented 1,730 valid instances of 268 different sales agents misrepresenting themselves in various manners in 2007 and 2008 (this total does not include other types of sales agent misconduct like [redacted]). CG Ex. 3.0 at 24-25, LL. 484-488.

CUB/AARP presented the testimony of nationally-recognized consumer protection expert, Barbara Alexander. Ms. Alexander was the Director of the Consumer Assistance Division of the Maine Public Utilities Commission ("MPUC") for nearly 10 years before opening her consulting practice, which is directed to consumer protection, customer service and low-income issues in both competitive and regulated markets for essential electric, natural gas

and telephone service. CG Ex. 1.0 at 1, LL. 11-12; 17-19. Her expertise includes state and federal consumer protection policies and programs targeted to residential customers in emerging competitive energy markets. *Id*. at 2, LL. 27-29. In her career at the MPUC, Ms. Alexander supervised the intake and resolution of customer complaints and implemented a complaint tracking database which she relied upon to provide testimony before the MPUC concerning utility compliance with consumer protection regulations. *Id*. at 4, LL. 82-85.

Ms. Alexander analyzed CUB's Consumer Inquiries ("CUB complaints") regarding USESC for 2007 and 2008 for purposes of testimony in this proceeding. Ms. Alexander removed any CUB complaint relating to the 2006 CUB Complaint or settlement (discussed infra). Because of the large volume of CUB complaints, Ms. Alexander selected representative months to perform a more detailed analysis, based on the scope of time represented in the allegations in the CUB/AARP Complaint: May 2007, October 2007, November 2007 and January 2008. CG Ex. 1.0 at 5, LL. 106-07. In all, Ms. Alexander performed a detailed analysis of 232 CUB complaints. Of the 232 complaints, 51% of consumers alleged they were told they would save money or that USESC's product would reduce their gas bill; 19% alleged that they were led to believe the USESC sales agent was associated with the utility or other agency; 18% involved a customer with a vulnerable condition; and 8% of customers alleged that they were either slammed or that USESC failed to properly identify the nature of the transaction. *Id*. at 7, LL. 133. Ms. Alexander concluded that, though the volume of complaints alone was significant, the real concern lay in the qualitative analysis of these complaints. CG Ex. 1.0C at 4-5, LL. 88-92. That analysis revealed a pattern of practice of USESC's agents marketing their natural gas product as a savings tool and by using other techniques designed to confuse or take advantage of consumers. *Id*. at 44-45.

The Better Business Bureau is a resource for objective, unbiased information on businesses. The BBB's network of national and local BBB operations allows for monitoring and action on thousands of business issues affecting consumers at any given time. The BBB has an established set of ethical marketplace standards which apply to all industries, with the exception of professional fields like attorneys and medical professionals. BBB does not compare businesses against each other, but rather evaluates businesses against its own standards, which speak to the character and competence of an organization. CUB Ex. 1.0 at 3, LL. 43-57. Ms. Lucy Jodlowska, Assistant Director of Investigations for the BBB, testified that she has personal knowledge of about 491 inquiries and complaints regarding USESC. Ms. Jodlowska testified that a majority of the BBB's complainants alleged misleading sales practices, allegations of misrepresentation of contract length, guarantees of savings, as well as the ability to cancel the program. Complaints also alleged that the company's representatives misrepresented themselves and their identities.

On February 7, 2008, the People of the State of Illinois by, Lisa Madigan, Attorney General of the State of Illinois ("AG") filed a complaint against USESC in the Circuit Court of Cook County alleging that USESC engaged in a "course of trade or commerce which constitutes unfair and/or deceptive acts and practices declared unlawful under section 2 of the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2." *People of the State of Illinois v. Illinois Energy Savings Corp*., No. 08 CH 04913. The AG alleges violations including various forms of misrepresentation, failing to disclose material terms of the contract, failing to obtain valid signatures on contracts prior to enrolling customer in the program, failing to allow customers to cancel within the statutory time period. *Id*. On May 14, 2009, USESC and the AG filed a public settlement agreement ("AG Settlement"), of which the Commission has taken

administrative notice. The Company agreed allow customers who attest that they were misled, or did not understand the USESC contract to exit their contracts without penalty. USESC also agreed to pay $1 million to these customers. The Company further agreed to make certain changes to its business practices.

Since the filing of the instant Complaint, the Pennsylvania Public Utility Commission ("PPUC") denied Just Energy Pennsylvania Corp. ("JEPC") a license to operate as an alternative natural gas supplier. In reaching this determination, the PPUC looked to the events in Illinois, including both CUB complaints and the AG civil complaint, as well as a consistently high level of complaints regarding JEPC's and USESC's New York affiliate, New York Energy Savings Corp. "(NYESC"). In its decision, the PPUC noted that the Attorney General of the State of New York ("NYAG") caused an inquiry to be made into NYESC, which was subsequently resolved by an agreement that required NYESC to pay $200,000 to the State of New York. The PPUC also considered the level of complaints relating to USESC's Texas operations, noting:

> The Public Utility Commission of Texas maintains a *Residential Retail Electric Provider Complaint Scorecard*. The scorecard groups the 33 to 34 retail electric providers into five groupings of approximately equal size based on a 6-month rolling average of complaint rates per 1,000 customers relative to other companies. Scorecards are available from September 1, 2008. JET consistently tracks in the fourth group, the 'higher than average rate of complaints' group.

The PPUC concluded that JEPC has not sufficiently "demonstrated that it has the necessary technical fitness to be granted a natural gas supplier license." At 9.

The Attorney General of the State of New York ("NYAG") recently entered into an Assurance of Discontinuance with USESC, in which USESC agreed to lower exit fees, a 30-day cancelation 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. 3.0 at 16-17, LL. 322-325, *citing In the Matter of U.S. Energy Savings Corp. d/b/a U.S. Energy Savings, Attorney General of the State of New York, Buffalo Office*, AOD #08-84 (June 2008). On September 14, 2009, the NYAG entered an Addendum to the Assurance that required USESC to further limit termination fees to $50, notify its contractors in writing of the requirements of the Addendum, amend its training materials for distributors and independent sales contractors, and amend its verification procedures, consumer agreements, and materials and letters provided to customers. *Id*., Addendum to the Assurance of Discontinuance Pursuant to Executive Law § 63(15).

III. THE COMMISSION SHOULD REVOKE USESC'S AGS CERTIFICATE BECAUSE USESC VIOLATED THE AGSL SUBSTANTIALLY AND REPEATEDLY (COUNT IV)

Section 19-120 of the PUA gives the Commission jurisdiction to entertain and dispose of complaints against AGSs providing service to residential and small business customers. 220 ILCS 5/19-120(b). Section 19-110 requires AGSs to maintain sufficient technical, financial, and managerial resources and abilities to provide the service for which it seeks a certificate of service authority and to comply with all applicable laws and rules. 220 ILCS 5/19-110(e)(1), (5). Section 19-115(b)(2) requires AGSs to continue to comply with the requirements for certification stated in Section 19-110. Section 19-115 requires alternative suppliers to adequately disclose prices, terms and conditions of service. 220 ILCS 5/19-115(f)(1), (2); Complaint at ¶ 26(d). Section 19-115 also requires AGSs to obtain verifiable authorization before the customer is switched to a new supplier. 220 ILCS 5/19-115(c); Complaint at ¶ 26(b), (c).

A. USESC VIOLATED THE AGSL REQUIREMENT TO MAINTAIN SUFFICIENT MANAGERIAL RESOURCES

The PUA requires an applicant for a certificate of service authority as an AGS to "possess sufficient technical, financial, and managerial resources and abilities to provide the service for which it seeks a certificate of service authority." 220 ILCS 5/19-110. The Commission's Rules further require that the applicant have "two or more individuals in management positions with four or more years demonstrated experience in a management position with enterprise financial and administration responsibilities including profit and loss responsibilities and four years natural gas sales experience…" 83 Ill. Admin. Code § 551.100. This rule further provides that "[t]he Commission may impose such terms and conditions as deemed necessary in order to insure the applicant is managerially qualified, commensurate with the anticipated scope of the service to be provided and residential or small commercial customers to be served." *Id*. at 551.100(c). In its Order granting USESC a certificate of authority, the Commission granted USESC's application without imposing any additional terms or conditions on USESC. Docket No. 03-0720, Order.

The AGSL was recently amended to include additional guidelines for considering whether the AGS maintains sufficient managerial resources. While this provision was not in effect during 2007 and 2008, the relevant time frame for the allegations in the instant Complaint, it is instructive to the Commission to review the information the General Assembly now believes is important to consider in determining whether to award an applicant with a certificate to operate as an AGS in Illinois:

> Sec. 19-112. Managerial resources.
> (a) An alternative gas supplier must maintain sufficient managerial resources and abilities to provide the service for which it has a certificate of service authority. In determining the level of managerial resources and abilities that the alternative gas supplier must demonstrate, the Commission shall consider, in addition to the requirements in 19-110(e)(1), the following:
> (1) complaints to the Commission by consumers regarding the alternative gas supplier, including those that reflect on the

> alternative gas supplier's ability to properly manage solicitation and authorization; and
> (2) the alternative gas supplier's involvement in the Commission's consumer complaint process, including the resources the alternative gas supplier dedicates to the process and the alternative gas supplier's ability to manage the issues raised by complaints, and the resolutions of the complaints.
> (b) 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, unless otherwise noted.

220 ILCS 5/19-112. Additionally, the new law requires Commission consideration of the applicant's "commitment of resources to the management of sales and marketing staff, through affirmative managerial policies, independent audits, technology, hands-on field monitoring and training, and, in the case of applicants who will have sales personnel or sales agents within the State of Illinois, the applicant's managerial presence within the State." 220 ILCS 5/19-110(e)(C). CUB/AARP have serious concerns about USESC's compliance with this new law, but evidence of the Company's most recent consumer complaints is not currently before this Commission.

The record in this proceeding demonstrates that USESC management has systematically failed to recognize, analyze or make serious attempts to eradicate the consistent trend of misleading and fraudulent marketing tactics of its sales agents. Because the Company has chosen a business model that carries a high risk of consumer confusion and has itself documented thousands of allegations of sales contractor misconduct, this management failure is inexcusable. USESC simply does not possess the necessary managerial resources to provide gas service in compliance with Illinois law, and despite having had several law suits filed against it alleging fraudulent sales tactics, the Company has failed to make material changes to its business model that recognize the severity of the problem. Instead, the Company generally maintained

throughout this proceeding and at the evidentiary hearing that there is no cause for concern. The evidence in this proceeding says otherwise.

1. USESC'S CANADIAN OWNERS' OVERSIGHT AND MANAGEMENT OF ITS ILLINOIS AFFILIATE IS SORELY LACKING.

As explained in the Statement of Facts, USESC management resides almost exclusively in Ontario Canada, save one Regulatory Director who lives in Springfield and one recently-appointed compliance manager, who supervises all 130 sales agents in the five Chicago sales offices. Tr. at 733/14 (Potter). USESC has relied almost entirely on independent contractors to operate and manage its sales offices. Tr. at 77/11 (Hames), Tr. at 189/7 (Nicholson). Each office is operated by a Regional Distributor, who is not an employee, but operates under a services agreement and is contractually bound to hire, train and supervise USESC's sales agents. IESC Ex. 1.0C at 8, LL. 175-178. Under Regional Distributors are crew coordinators, who generally oversee about ten sales agents each. Tr. at 134/20. Each independent contractor, including sales agents and the Regional Distributors and crew coordinators who manage and oversee the agents, works 100% on commission. *Id*. The Sales and Compliance Manager, who is a salaried employee was appointed in June 2009, to comply with the AG Settlement.

USESC witness Gord Potter, Executive Vice President of Regulatory and Legal Affairs, (tr. at 680/10 (Potter)), supports his claim that USESC asserts sufficient managerial control over its Illinois sales offices by testifying that "there is daily communication between Ontario-based Sales and Marketing personnel and the Regional Distributors..." and weekly communications with CCR group concerning sales agent conduct. IESC Ex. 5.0 at 5-6, LL. 121-24. Mr. Potter claims that the Sales and Marketing department have "always traveled to Illinois offices on a regular basis and conducted general reviews of the practices and materials at each office. In 2008, the frequency of these visits increased as part of the effort to provide greater direction and

oversight of sales practices." IESC Ex. 5.0 at 7, LL. 153-56. He claims the scope of these visits has now expanded to include, for example, compliance and code of conduct training and field training. *Id*. at 7, LL. 157-162.

Mr. Potter attached a list of all OESC employees and executives that have traveled to the Illinois sales offices between January 2007 through September 2008. Exhibit 5.1. A blank "check list" was supposed to be used for each visit that, according to Mr. Potter, reflects the outline of actions investigated during the visits by head-office personnel. CG Ex. 3.0 at 9-10, LL. 187-195. However, of the 48 documented visits, the checklist was used or completed in only three of them. CG Ex. 3.0 at 10, LL. 200-207. The approach to documentation on these checklists was haphazard, with blanks or "n/a" next to key provisions like "code of conduct" and "compliance process documentation." *Id*.

Ms. Findley confirmed on cross-examination that the CCR group does not use this checklist. Tr. at 327/12 (Findley). The Company did not provide any documents or any narrative analysis substantiating the purpose of or result from each particular visit. CG Ex. 3.0 at 10, LL. 200-207. Mr. Potter's attempt to prove meaningful management oversight of sales agents with this exhibit therefore fails for lack of documentation or other explanation of the substance of each visit.

In his rebuttal testimony, Mr. Potter indicated that staff from the sales and marketing office have traveled to Illinois on a regular basis and that these visits included "field training and shadowing." IESC Ex. 5.0 at 7, LL. 157-62. USESC response to CSD 1.06 Mr. Hames similarly testified that "[f]rom time to time, our contractors will go into the field with a head office person to show them how we market so they have a good sense of what in fact goes on at the door." IESC Ex. 4.0 at 8, LL. 167-169. When asked in discovery if USESC ever conducted field

training or shadowing of independent sales agents, the Company responded that "USESC does not monitor performance by attending at doors with contractors." CG Ex. 1.0C at 40, LL. 818-19, *citing* USESC Response to CSD 1.06. When later asked to provide documentation for the field visits cited in testimony, USESC first objected on the grounds that it is "unduly burdensome because Respondent does not maintain the requested data." USESC Response to CUB 4.24(c).

After CUB filed a motion to compel this information, however, the Company turned over a list of visits that already had been provided by Mr. Potter in Exhibit 5.1. This document simply lists the names of USESC staff and the dates they traveled to Illinois. It does not document the purpose, content, or even agenda of these visits. Further, it is impossible to tell if any of these visits included "field training" or any type of monitoring of sales calls. The list does not detail the nature or purpose of the visit, the specific USESC office visited or any meetings with regional distributors or sales agents. IESC Ex. 5.1. The company has failed to present any evidence that field training or shadowing of sales agents from the corporate office—key tools the company could use to monitor and correct improper sales activities—occurred on a regular basis.

In February 2008, as CBS 2 was preparing to air an investigative report on USESC's misleading marketing practices, then Senior Vice President-Sales Paul Goddard visited all Illinois sales offices and found unapproved, "non-USESC documents in all or virtually all of the offices." The unapproved documents included a training document called "New Agent Instructions" that suggested sales agents should wear "dark utility style work pants" (CG Ex. 1.3) and utility bills. This was the only visit by USESC's corporate office specifically identified as a field visit in any of the company's discovery responses or testimony. When asked in discovery if any disciplinary action was taken as a result of Mr. Goddard's findings during this visit, the

Company responded that "no disciplinary action was taken…Mr. Goddard determined that no consequences were warranted." CUB Cross Ex. 12.

When asked about this February 2008 visit from Mr. Goddard, Mr. Hames testified that, while he remembered the visit, he was not told whether unapproved documents were found at his office. Tr. at 118/3 (Hames). Mr. Nicholson also testified that he had no recollection of Mr. Goddard finding unapproved documents in his sales office. Tr. at 211/11 (Nicholson). Given the serious nature of Mr. Goddard's findings, demonstrated by the fact that the unapproved documents were immediately destroyed, it is only reasonable to expect that USESC would not only notify all regional managers of Mr. Goddard's findings, but also impose consequences for such a grave violation of company policy. Yet, the two regional managers who testified in this case knew nothing of this incident. Mr. Goddard was terminated by the Company on Aug. 11, 2008, and the details of his termination agreement remain confidential. CG Ex. 3.2.

USESC has failed to document that staff from the corporate office exercised any meaningful control over the conduct of the Company's sales force. The fact that two regional managers were unaware that the Vice President of Sales found unapproved documents in Illinois sales offices demonstrates the "hands off" approach USESC's corporate office has taken to its Illinois operations. It is clear from the evidence that USESC lacks the managerial control of its business required for an alternative natural gas supplier under Illinois law.

2. THE COMPANY'S OWN EVIDENCE OF SALES AGENT MISCONDUCT – EVIDENCE USESC ATTEMPTED TO SHIELD FROM THE COMMISSION – CORROBORATES CUB/AARPS CLAIMS

CUB and Staff each requested information relating to the Company's internal complaints in the course of this proceeding. In response to a Staff data request (CSD 2.06) asking for the number of complaints USESC received directly from customers through written notice, phone

calls or e-mail, the Company responded that it "does not log customer contacts by category. USESC does not know of any reasonable method to obtain this information." CUB Cross Ex. 14. This discovery response contradicted the testimony of Ms. Findley, USESC's Manager of Corporate and Consumer Relations, that the Company "maintains a record of allegations brought to our attention…" IESC Ex. 2.0 at 4, LL. 83-84. When asked on cross-examination if this response was accurate, Mr. Potter responded "[i]t's not accurate now." Tr. at 482/2 (Potter). Mr. Potter further testified that he was very familiar with the compliance database. *Id*.

The Company's statements in testimony and discovery are clearly contradictory – on the one hand USESC responds that it does not log complaints and on the other it admits to maintaining a comprehensive compliance database where customer feedback is apparently electronically recorded. When the Company finally provided documents from its compliance database in December 2008 (6 months after the information was requested and only after a Motion to Compel was filed[8]), it became clear that not only does USESC track customer feedback in a database, but the compliance database is comprehensive in scope, including 19 different classifications of allegations. Tr. at 484/3 (Potter). [redacted] CG Ex. 3.0 at 22, LL. 432-460. The database automatically generates an allegation letter when a complaint is closed and a penalty letter when an allegation is determined to be valid. Tr. at 341/3 (Findley). The penalty letter details the point value or other consequence resulting from the allegation. Tr. at 346/3 (Findley). While the generation of the letter is automatic, the determination of whether an allegation is valid is up to the discretion of the CCR department.

[8] The Company first objected to the request on the grounds that it was "overly burdensome and not reasonably calculated to lead to the discovery of admissible evidence because it would require Respondent to review all data in order to compile the particular information relating to a type of misconduct alleged in the Complaint."

The allegation and penalty letters recite the allegation received from the customer directly, or from CUB, the Commission or other source, the date of the allegation, and the points imposed on the agent as a result of the investigation. CG Ex. 3.0 at 24, LL. 469-76. The letters do not inform the agent the reason for the point value or why management found the allegation to be verified. *Id*. Nor do the letters inform the sales agent of any other consequences, such as mandatory training, forfeiture of commission fees, or other disciplinary actions. *Id*. From the thousands of penalty letters provided to CUB in discovery, the data shows that 268 different contractors were cited for various infractions in 2007 and 2008. *Id*. at 24-25, LL. 484-498. The total number of valid, actionable instances of misrepresentation of price, savings, the nature of the agreement or the relationship between USESC and the utility was 1,730.

This evidence most clearly demonstrates that the Company knew or should have known not only about individual allegations of improper or unlawful conduct of its sales agents, conduct that violates USESC's own internal Code of Conduct and Illinois law, but also that a systemic pattern of potentially unlawful conduct of the Company's sales force was present. The Company's compliance database shows that USESC lacks managerial control over its sales force and its handling of complaints, all of which substantiate CUB/AARP's allegations that USESC violated its obligations under the PUA. See 220 ILCS 19/110-115; Complaint at para. 25.

3. USESC'S COMPLIANCE DEPARTMENT OPERATES ON AN AD HOC BASIS, LARGELY IGNORING ITS OWN POLICIES AND PROCEDURES

Although in discovery, USESC refused to provide information regarding its Internal Compliance Department[9], Mr. Potter testified that the CCR group reports to him, though there is now a new director for the CCR group. USESC witness Frances Findley reports to the new

[9] The Company responded to CUB 4.03 by objecting and directing CUB to the testimony of Mr. Potter stating, among other things, that "USESC uses a multi-faceted and multi-departmental approach to resolving any concerns that may be raised."

director, who in turn reports to Mr. Potter. Mr. Potter still has veto authority over CCR decisions and the group ultimately reports to him. Tr. at 687/6 (Potter). Mr. Potter testified that he acts in a consultation role to the CCR department. Tr. at 686/11 (Potter). Mr. Potter acknowledges that the Company takes an ad hoc approach to resolving customer complaints. He testified that complaints are resolved depending on the "nature of the situation, and [by] the person best suited to arrive at a resolution with the customer." IESC Ex. 1.0 at 16, LL. 359-60. He further stated that concerns are resolved on a "case-by-case" basis, but that they set out general policies to assist staff, especially more junior staff, in arriving at reasonable resolutions." *Id*. at 15, 364-65.

Ms. Findley, Manager of Corporate and Consumer Relations ("CCR") department, testified that the CCR group handles only complaints relating to contractor misconduct. Tr. at 373/1 (Findley). In concert with the compliance database, the CCR group uses a [redacted] Tr. at 319/13 (Findley).

[redacted] Tr. at 345/10 (Findley). Despite the particularity of this consequence schedule, Mr. Potter testified that the CCR group uses its discretion to determine when to implement points, penalties or consequences for allegations of contractor misconduct. Tr. at 700/19 (Potter). Ms. Findley similarly testified that a sales agent could have multiple allegations against him, but not accumulate any points, because none of them were deemed valid and no trend was identified. Tr. at 282/17 (Findley). That sales agent would not accrue any points or consequences, despite having potentially numerous allegations attributed to him.

In the data provided to CUB/AARP in response to CUB data requests 2.24, 2.53 and 6.32, which is the allegation and penalty letters and allegation summary data, of the contractors issued confirmation of valid allegations, only 15 received any "consequences" at all: two were terminated, one was suspended, one was required to undergo field shadowing, seven were fined $25, one was required to undergo a refresher training session, one was told he was being "closely monitored by CCR," and two were given a monetary fine or consequence that was not documented. CG Ex. 3.0 at 25, LL. 488-98, CG Ex. 3.6. Based on the large discrepancy between the number of valid instances of sales contractor misconduct and the number and types of consequences issued by CCR, Ms. Alexander concluded that USESC's disciplinary policy is insufficient and fails to properly respond to a repeated pattern of misrepresentation in the marketing of its five-year fixed price contracts. *Id*. This discrepancy also demonstrates that the Company did not adhere to its stated policies regarding consequences for contractor misconduct.

While Ms. Findley testifies that she believes the CCR department goes "over and beyond" the point schedule if they find that a trend is occurring, and will terminate a contractor before he receives 40 points "if it's too much of a risk for the contractor to be marketing," (tr. at 334/9 (Findley)), the data shows otherwise, as indicated in the lack of documented consequences.

Although Mr. Potter claimed on cross-examination that the Company has recently moved away from the point system in order to achieve a more fact-based, less subjective allegation investigation procedure, he confirmed that the Company still uses a Matrix and that it is subjectively applied. Tr. at 491/5 (Potter). Mr. Potter testified that CCR has "complete latitude" to override the Compliance Matrix discussed above and that there is a lot of judgment involved in applying consequences to sales agent misconduct. Tr. at 492/1 (Potter).

The Company's [redacted] (CUB Cross Ex. 6), put into effect in February 2008, also describes consequences for sales agent misconduct. Mr. Potter describes this as the "three strikes rule," and asserts this is an example of USESC implementing "stronger consequences for misrepresentations identified through the voice recorded verification process." IESC Ex. 5.0C at 41, LL. 933-35. [redacted] *Id*. at 41, LL. 936-41. Under this regime, the Company assigned a $25 fine 22 times, a $50 fine 1 time and had not terminated any employees under this structure. Ms. Findley testified that she had no reason to doubt that this information was accurate. Tr. at 273/5 (Findley). As of January 2009, no contractor was terminated under this three strikes rule. CG Ex. 3.0 at 26, LL. 513-15.

A Regional Distributor for USESC, Mr. William Nicholson, testified that in training new sales agents, the first thing he does is write the word "ethics" on the board. IESC Ex. 3.0C at 3, L. 59. He feels very confident his agents are trained to refrain from promising savings. Tr. at 190/6 (Nicholson). Mr. Nicholson does not, however, perform in-field training – that function is handled by crew coordinators. Tr. at 192/11 (Nicholson). He believes that it is relatively rare that he receives evidence of wrongdoing of his sales agents. IESC Ex. 3.0C at 5. During 2005 and 2006, Mr. Nicholson was formerly a sales agent himself, before being promoted to Regional Distributor. On cross-examination, Mr. Nicholson was asked about [redacted] Tr. at 209/4. [redacted]

The Company eventually turned over thousands of pages of data regarding allegations of contractor misconduct from the CCR group[10]. Additionally, hundreds more documents were served on CUB in November 2008 relating to customer allegations of fraudulent conduct of sales agents. This information is obviously integral to the allegations in the Complaint and would have been responsive to several prior data requests, some that were served in May and June. See, *e.g.*, Staff DR CSD 2.06; CUB 2.54. Considering the essential nature of this evidence to this proceeding, the Company delay tactics, objections and contradictory discovery responses are

[10] The Company's discovery Exhibit 6.32 (referred to in the Company's response to 2.53, 2.54, 2.57 and 4.02(b)(ii)), which is summarized in Barbara Alexander's Surrebuttal Exhibit 3.6.

inexcusable. Nonetheless, under less than desirable circumstances, Ms. Alexander analyzed the Company's allegation data and, according to this data, it received 2,664 allegations from Illinois customers in 2007 and 2,966 in 2008 for a total of 5,630. CG Ex. 3.0 at 16, LL. 310-314. Of this total, 1,814 related to instances of alleged misrepresentation during 2007 and 2008. *Id*. Ms. Alexander noted that the incidence of misrepresentation increased in 2008 compared to 2007 with a significant increase in December 2008. *Id*.

Mr. Potter believes that the CCR department has been effective, "though nothing can prevent unlawful behavior altogether." IESC Ex. 1.0 at 9, LL. 189-90. The volume and nature of the allegations against contractors, however, in relation to the consequences levied against them, reveals a serious lack of management oversight of conduct of USESC's sales agents in Illinois.

4. USESC'S POLICIES AND PROCEDURES – EVEN WHEN FOLLOWED – DO NOT PROTECT CONSUMERS FROM PREDICTABLE PITFALLS OF DOOR-TO-DOOR SALES

USESC argues that it has implemented policies and procedures designed to crack down on misleading marketing at the door by sales agents, but the evidence shows that even when those policies are followed they are insufficient to guard against the problems associated with door-to-door marketing. A prime example of this is the Company's third party verification process, which Mr. Potter explains is designed to protect the customer from possible "fraud and wrongdoing" and help the company defend itself against allegations of improper behavior after the agreement has taken effect. IESC Ex. 1.0 at 13, LL. 277, 282-283. In reality, however, the verification process, as designed by the Company, instead works to reinforce the aggressive sales tactics occurring at the customer's door.

According to Company policy, once the customer has agreed to take service with USESC, the sales agent is instructed to initiate a phone call to the verification agent to obtain a "fixed

price reservation code" that will confirm the customer agreement. IESC Ex. 1.0C at 12. The agent then puts the customer on phone with a third party who reads a script that solicits yes and no answers from the customer. IESC Ex. 1.0C at 12. As company witness Findley confirms, USESC sales agents are strongly encouraged to get the customer contract verified, through a voice-recorded verification call, at the time of the sale. Ms. Findley testified that the Company's sales agents are "absolutely" encouraged to get the FPRC at the time of sale. Tr. at 285/20 (Findley). The alternative to getting the FPRC code at the point and time of sale is for the Company to perform an outbound verification call. Tr. at 285/14 (Findley). Ms. Findley testified that, during most of 2008, the actual rate of outbound verification calls – made after the sales agent has left the customer's home – was under one percent. Tr. at 287/11; CUB Cross Exhibit 7. In the Company's preferred scenario, the sales agent is present the entire time during the verification call. Tr. at 285/8 (Findley).

Although the Company claims this process is meant to capture a customer's consent to the material terms of the contract and ensure customers cannot misunderstand the contract they are signing, as Staff witness Agnew explains, the system is fraught with problems. First, Mr. Agnew notes the presence of the sales agent during the verification call is paramount: "I believe that the face-to-face presence, the presence of the sales agent being there physically, with the customer, is a much stronger thing that any phone call or piece of paper that any of us could look at." Tr. at 913 -914/ 21 (Agnew). Mr. Agnew also correctly notes that the sales agent can coach the customer during the verification call. Tr. at 915/2 (Agnew). This is precisely what happened to CUB Witness Alex Zermeno during his verification call. CUB Ex. 4.0 at 2, L. 28. In conclusion, Mr. Agnew does not believe the Company's verification process guarantees that customers cannot be misled about the contract they are signing.

CUB witness Barbara Alexander expressed similar concerns about the Company's verification process. First, she explained that use of term "fixed price reservation code" implies that the underlying transaction is somehow official and a reservation is somehow required. CG Ex. 3.0 at 31, LL. 620–24. Based on her review of the verification scripts and the actual taped calls turned over in discovery, Ms. Alexander concluded that the verification calls were designed to "lead" the customer and suggest responses. *Id*. at 31, LL. 611. She detailed how the scripts co-mingle marketing and sales pitches as part of the verification process and concluded this is not appropriate. CG Ex. 2.0 at 2, LL. 407-409. Ms. Findley acknowledged on cross-examination that the verification script in effect during 2007 and early 2008 consisted a large compound question and did not require the customer to specifically agree that USESC is not affiliated with the utility. Tr. at 360/14 (Findley). In fact, in the verification procedure applicable during that time, this disclosure is not made until after the customer had already confirmed their agreement to initiate service. Tr. at 362/12 (Findley).

Like Mr. Agnew, Ms. Alexander expressed concern about the potential for abuse when the sales agent attends the verification call and is responsible for putting the customer on the line. She notes the testimony of Ms. Catherine Vargas, whose service was switched to USESC without her authorization, as further proof of how company's verification process is subject to abuse. CG Ex. 2.0 at 20, LL. 408–409.

5. CHANGES TO CONTRACTS, TERMINATION FEES AND MARKETING MATERIALS ARE ONLY DONE IN REACTION TO LAW SUITS AND NEGATIVE MEDIA AND ANY CHANGES INSTITUTED AS A RESULT HAVE NOT SOLVED THE PROBLEM.

Mr. Potter testified at length about the improvements to its training processes USESC has recently instituted. In his Rebuttal Testimony, filed in October 2008, Mr. Potter stated that "USESC has improved in the past, and continues improve its policies and practices with regard to marketing and customer service." IESC Ex. 5.0C at 1, LL. 14-15. With regard to oversight of

sales contractors, he describes changes to the sales manual, training, consequences and document control. IESC Ex. 5.0 at 39, LL. 900-905.

As Ms. Alexander noted, however, USESC did nothing during 2007 and into early 2008 to respond to the avalanche of complaints that alleged the same misconduct that Mr. Potter claims was the basis for certain business changes in February 2008. CG Ex. 3.0 at 12, LL. 237-40. Rather, contrary to Mr. Potter's assertions, USESC consistently refused to provide any evidence of an analysis of customer complaints by management. *Id*. Instead of accepting responsibility for heightened level of complaints, the Company preferred to blame "negative publicity primarily generated by CUB," and insufficient consumer education on customer choice issues. IESC Ex. 5.0 at 29, 648-656. In examining the trends in 2008, Mr. Potter claims the customer complaints relate more to customer confusion than sales agent misconduct. *Id*. at 29, LL. 658-668.

On February7, 2008, a Chicago television station (CBS2) ran a story detailing an expose of USESC's training processes and sales methods. Complaint, Exhibit I. That week, the preceding V.P. of Sales, Mr. Paul Goddard, visited all five Chicago sales offices, as described above, and found volumes of unapproved training and marketing material. CG Ex. 2.0C at 13. Later that month, USESC engaged in a dialogue with Commission Staff regarding its customer contracts and verification procedures. IESC Ex. 5.0c at 30, LL. 689-692. Subsequently, USESC made certain changes to its customer contracts, revised its internal Code of Conduct, pledged to monitor its verification calls more closely, and to document disciplinary actions with respect to Illinois sales agents. CG Ex. 3.0 at 12, LL. 231-33. Though voluntary, these changes were all in reaction to negative media or heavy influence of state regulators. There is no evidence these changes were undertaken as a result of the Company's own analysis of customer complaints or

its own internal initiative. Nor did these changes adequately address the substantial problems identified in this case, as concluded by Ms. Alexander. CG Ex. 3.0 at 12, LL. 235-236.

Further, as described in more detail below, the Company pledged additional business changes as a result of the AG Settlement, executed in May 2009. Most of these changes are substantially similar or identical to the requirements under the recently-amended AGSL. While these changes are steps in the right direction, they simply fail to address the key problem with USESC's marketing: without effective supervision or auditing of sales activity on customer's doorstep, no amount of promises to be better will suffice. This is a clear instance of too little too late. Tellingly, Mr. Potter attempted to downplay the impact of the complaints and largely blames negative media attention and cold weather for the admitted peak in complaints in winter 2008. IESC Ex. 5.0 at 28-29, LL. 645-646, 648-649.

Mr. Potter attempted to characterize the Company's complaints as having "decreased dramatically" in 2008 to support his contention that there is no correlation between the level of cancelations and customer satisfaction. IESC Ex. 5.0 at 46, LL. 1044-50. He notes the rate of cancelations by averaging the total complaints per year by month and that 2008 calculates a decrease in complaints of almost 60%. *Id*. This analysis did not compare the cancelations to the total contracts signed during each period. Mr. Potter then attributes this supposed decline complaints to the success of the Company's training program. *Id*. at 46, LL. 1054-55. In the same piece of testimony, however, Mr. Potter criticizes CUB witness Marcelin for not taking sales activity in account in her calculation of complaint rates. IESC Ex. 5.0 at 16, LL. 359-60. Mr. Potter emphasizes in that testimony that "market share will have a direct impact on the volume of informal complaints." *Id*. at 12, LL. 280. On cross-examination, Mr. Potter agreed that, if he would have compared the number of complaints in 2007 and 2008 to total sales

activity, the result would have been approximately the same rate of complaints. Tr. at 509/8 (Potter).

6. USESC DISCRIMINATORILY APPLIES ITS CANCELLATION POLICIES

The evidence demonstrates that USESC discriminatorily applies its cancelation terms and otherwise modifies the terms of the contract in an effort to "retain" customers in violation of 220 ILCS 5/19-115(e)(1). *See* CG Ex. 2.0 at 23, LL. 465. USESC customer service representatives are trained to offer a lower price to customers who call seeking to cancel their agreement. In response to a data request inquiring about the Company's "retention initiatives," (CUB 2.36), USESC stated "Retention initiatives mean tools used by customer service representatives to retain customers. Investigation continues." CG Ex. 1.0C at 34, L. 692. When further inquiry was made regarding this statement, the Company refused to answer and only provided a response after CUB filed a Motion to Compel.

The Company eventually produced a "Cancelation Matrix," attached to Ms. Alexander's Rebuttal Testimony as Exhibit 2.3, which details the situations where USESC customer service representatives should apply the exit fee or waive it. The waiver policy, however, appears to only apply if the customer calls to complain or seeks to cancel and is only offered in certain circumstances, apparently at the discretion of the CSR and not in a uniform manner. CG Ex. 1.0 at 34, LL. 699. The fact that certain categories of customers can avoid the termination fee by just contacting the company is not contained in the contract or revealed in a disclosure. *Id*. at 34, LL. 703-05. Thus, those customers that would qualify for a waiver of the fee are not aware of this opportunity. *Id*.

Those customers that are not offered a waiver of the applicable termination fee are often charged exorbitant fees in excess of $1000, in some cases several thousand dollars (for commercial customers). CG Ex. 1.0 at 33, LL. 672-76. Aside from the punitive nature of this

extremely high cancelation fee, this has the effect of holding those customers that cannot afford to pay it prisoners to the contract, especially in cases where the customer is a low income or fixed-income client. *Id*., tr. at 673/20 (Alexander). The Company's application of its early termination fees is discriminatory because a waiver only applies to certain classes of customers who seek to cancel. Others, who choose to and can afford to pay the termination fee are then stuck paying hundreds or even over a thousand dollars to cancel.

USESC changed its termination fee clause in its contract after discussions with Staff in early 2008, limiting the total fee to $75 per year on the remaining life of the contract. For a five year agreement canceled soon after it was signed, this could mean total termination fees of $375. Pursuant to the recent amendments to the AGSL, termination fees are now limited to $50. However, the termination fee provision in customer's contracts signed previous to these changes will stand for those agreements.

7. USESC HAS NOT CONDUCTED ITSELF IN A REASONABLE MANNER IN THIS PROCEEDING, FURTHER QUESTIONING ITS MANAGERIAL FITNESS

As is evident from the discussion of discovery disputes described throughout this Initial Brief, the Company engaged in a game of cat and mouse in its approach to discovery in this proceeding, where it answered some responses vaguely, contradicted itself in other responses, and refused to answer follow-up requests seeking clarification, each of which necessitated additional discovery, attorney conferences, motions to compel and a motion for sanctions. Both Commission Rule 200.340 and Supreme Court. Rule 201(b)(1) require full disclosure of all relevant material. 83 Ill. Admin. Code § 200.340. Section 200.410 of the Commission Rules requires that all responses to data requests "shall be served within 28 days after the service of the request, unless the period is shortened or lengthened by the Hearing Examiner or by agreement of the parties." Id. at § 200.410. The AGSL requires all AGSs to comply with all applicable

laws and rules. 220 ILCS 5/19-110 (e)(2). USESC demonstrated a flagrant disregard for the Commission's Rules of Practice throughout the discovery process.

The Company's delay in providing clearly responsive – and critically important – information, in some cases by more than six months, significantly hampered CUB's ability to prepare its case, precluded CUB from including potentially critical information in its rebuttal testimony, and prejudiced Ms. Alexander's preparation of surrebuttal testimony. For example, USESC answered with the phrase "investigation continues" to 21 data requests from CUB and Staff served in May and June 2008, and did not further respond on many of those requests until months later, after two motions to compel were filed by CUB. The most egregious example of the Company's resistance to discovery efforts is its denial of and refusal to provide thousands of documents relating to its own evidence of customer complaints and allegations against sales agents. *See* CG Ex. 3.0 at 14, LL. 267-275. Although it is not surprising the Company would seek to hide the unhelpful evidence of sales agent misconduct and sorely deficient management oversight, the pattern of delay, avoidance, and undue objections is a clear violation of the Commission's Rules of Practice. This behavior is emblematic of the way USESC conducts is business, further demonstrates the Company's lack of managerial responsibility and fitness and supports the remedies sought herein.

B. USESC SLAMMED CUSTOMERS IN VIOLATION OF THE PUA

As alleged in paragraph 26(b) and (c) of the CUB/AARP Complaint, CUB has received numerous complaints from consumers alleging USESC changed their gas service from the utility to USESC without proper authorization and/or verification. The AGSL requires that the ARG obtain verifiable authorization from a customer before the customer is switched from another supplier. 220 ILCS 5/19-115(c). As discussed by Ms. Alexander, seven of the CUB Complaints

she reviewed document that USESC agents have either forged signatures, or obtained signatures from spouses who are not listed on the customer records of the utility. CG Ex. 1.0 at 29, LL. 583-85. Additionally, the Company's own records show 115 valid instances of unauthorized signature on the contract during 2007 and 2008. *See* CG Ex. 3.6.

In addition to consumers who's signatures were forged, Ms. Alexander's investigated the verification tapes for those CUB complaints where the customer alleged that they were "slammed" or that they had not, in fact, signed up with USESC. CG Ex. 3.0 at 32, LL. 644-48. In all, Ms. Alexander reviewed 14 verification tapes and found that seven of them concerned contracts entered into after January 1, 2007. *Id*. Of these seven, Ms. Alexander determined that four of them, when read in context with the underlying CUB complaint, clearly showed evidence of customer confusion or fraud. *Id*.

CUB Witness Catherine Vargas testified about her experience with USESC, which switched her gas supply service without authorization in the winter of 2007 – 2008. Several weeks after rejecting a sales offer from USESC agent Mr. Franklin Grey, Ms. Vargas received a "welcome letter" thanking her for enrolling in USESC's fixed price natural gas plan. CUB Ex. 3.0 at 2, L. 29. After several unsuccessful attempts to get the fraudulent USESC contract cancelled, Ms. Vargas contacted CUB. CUB Ex. 3.0 at 3, L. 33. Ms. Vargas testified that Mr. Grey asked to see a copy of her gas bill to determine if she "qualified" for the USESC offer. She allowed him to look at her bill but declined the offer. Ms. Vargas said she believes Mr. Grey captured her account number from her bill and used it to enroll her service with USESC.

In response to CUB 5.02, the company provided the verification call that supposedly confirmed Ms. Vargas' customer agreement. Upon listening to that call, Ms. Vargas testified that it was not her voice on the call and that she never signed any forms or participated in any

call with the company. CUB Ex. 6.0 at 2, LL. 29-39. CUB witness Alexander also reviewed the verification call and testified that the voice purporting to be Ms. Vargas did not sound like a woman. CG Ex. 2.0C at 21, LL. 419-420. In fact, during the call, the verification agent herself/himself questions whether the person on the phone is actually Ms. Vargas. CUB Cross Ex. 8 at 5, LL. 19. Despite the overwhelming evidence that fraud was occurring, the independent verification agent proceeded to process the contract.

C. USESC FAILS TO DISCLOSE IN PLAIN LANGUAGE THE PRICES, TERMS & CONDITIONS OF ITS PRODUCTS

As alleged in paragraph 26(d) of the CUB/AARP Complaint, USESC has failed to accurately and completely disclose the material terms of its product. As Ms. Alexander testified, "USESC's marketing practices are at odds with the stated policies and contractual terms and are generally designed to hide the likely adverse result of entering into a 4– or 5–year fixed price contract that is, in almost all cases, higher than the prices charged by utilities for regulated natural gas supply service." For example, Ms. Alexander describes a document titled, "The Benefits of a Long Term Fixed Price vs. Variable Market Price," which sales agents are trained to hand out with each contract. The chart has a straight line fixed price compared to a volatile line that moves primarily higher than the fixed price straight line. The material encourages customers to "Lock in now and protect yourself against further increases." CG Ex. 1.0, 22, LL. 441-445. When asked in discovery to explain the basis for the "variable market price" line on the chart, the company was unable to do so. CG Ex.1.0 at 22, fn 23.

Ms. Alexander also notes that some marketing materials used in Illinois stated that customers have "saved millions of dollars over the terms of the agreements." CG Ex. 1.0, 23, LL. 447-449. In fact, Mr. Potter reported, in his rebuttal testimony filed Dec. 16, 2008, that as of that date, [redacted] residential customers had completed the full term of their contracts and that [redacted]

percent of them had saved money. USESC Ex. 5.0 at 24, LL. 533-538. The average savings per residential customer was [redacted]. *Id*. There is absolutely no credible basis to support a claim that Illinois customers have saved "millions of dollars," the clear intent of that statement.

As part of his direct testimony, Mr. Potter submitted IESC Ex. 1.6, a sample welcome letter the company sends to new customers. While the letter details the length of the customer's contract term and the contract price, it also includes a chart titled "Natural gas commodity price information." IESC Ex. 1.6. The chart touts the price stability the USESC fixed price program will provide the customer. *Id*. Like the marketing brochure referenced by Ms. Alexander, the chart compares a jagged line illustrating the volatile commodity prices of Nicor Gas from May 2003 to Aug. 2008. It fixes the USESC price, labeled "Your Price," at just under $1.20 per therm for this particular customer and then a vertical line shoots up to the range of roughly $1.50 per therm for the month of August. IESC Ex. 1.6, 2. The problem with this chart is that it accompanies a welcome letter dated July 14, 2008. *Id*. This document clearly is designed to enforce the notion that prices are shooting up—a fact USESC acknowledges it cannot determine—and that the customer is lucky to have natural gas prices locked in.

While USESC insists that its contract, written documents, training materials and verification scripts are designed to ensure the customer understands the product, the evidence demonstrates that customers are relying on the persuasive verbal sales pitch on the porch to understand the product, rather than the written documents or the verification call. Tr. at 913-914/ 21 (Agnew). Ms. Alexander confirmed on cross-examination that "most consumers, in my opinion and my experience, do not understand how the utility's gas portfolio is managed and what criteria governs it…" Tr. at 676/6 (Alexander). The issue of consumer education was discussed by Ms. Alexander at some length at the evidentiary hearing. Tr. at 659/13(Alexander).

When asked if customers can understand that the price of natural gas cannot be predicted five years out, Ms. Alexander responded that she "does not believe they were given straightforward information that would allow them to make that decision." Tr. at 607/10 (Alexander).

The evidence shows that USESC does not provide customers with the relevant information they need to understand the offer they are presented with and, in fact, the company provides misleading marketing materials that promise or imply savings.

D. USESC UNLAWFULLY TARGETS SENIORS, NON-ENGLISH SPEAKERS AND LOW-INCOME AREAS

The evidence uncovered in the course of discovery has revealed that the Company unlawfully targets seniors, non-English speakers and low-income areas. See CG Exhibit 2.0 at 15, and Exhibit 2.2. The PUA requires that AGSs "not establish any differences as to prices, terms, conditions, products, facilities, or in any other respect, whereby such denial or difference is based upon race, gender or income." 220 ILCS 5/19-115(e)(1). In this case, the evidence establishes that USESC differentiates among income and race in its marketing efforts, exhibiting a preference for selling to certain classes of customers: those consumers who are least able to understand the nature of the contract, most vulnerable to claims of savings, and least able to afford paying a premium for "price stability." CG Ex. 1.0 at 38, LL. 779-784. Ms. Alexander's review of CUB Complaints showed 104 instances in which the complaint record identifies the customer as "elderly" and 408 instances in which the customer is identified as a "senior." CG Ex. 1.0 at 367, LL. 750-753. Ms. Alexander noted over 600 instances of individuals referenced as "Spanish."

Although the Company repeatedly alleged that it does not direct contractors to market in specific areas and in fact does not know where its agents market until it reviews where contracts have been signed, it was later revealed – again, after the filing of a motion to compel – that the

Company communicates with Illinois utilities regarding where its sales agents market before the marketing actually occurs. Ex. 2.0 at 15, and CG Ex. 2.2. The Company's inconsistent and incompatible statements regarding its knowledge of where its sales agents will market before the fact raises serious concern.

Equally concerning is the Company's reluctance to provide information contradicting Mr. Hames' suggestion that no guidance is provided in determining areas in which to market. CUB initially requested information relating to USESC's communications with the utilities regarding its independent contractors targeted marketing in September 2008, in data requests 4.05 and 4.06. The Company initially objected and did not respond, but was later directed to provide the information in an ALJ Order granting CUB's motion to compel. Dec. 23, 2008 Ruling on Motion to Compel at 8. On December 23, 2008, two months after the information was requested, CUB received what the Company marked as Exhibit 4.05, which consists of approximately 40 emails from February 2007 to December 2008 sent by USESC to utility companies detailing where USESC sales agents would be selling USESC products for the following week, including detailed zip code and town information to utilities for the weeks it plans to market in those areas.

USESC witness Hames testifies that "contractors, in conjunction with crew coordinators, decide where to market and to whom to market." IESC Ex. 4.0 at 6, LL. 114-115. He later claims that "[w]e do not tell contractors where to market. We tell the contractors that they are free to market wherever they choose, subject to license restrictions and the do not solicit lists." IESC Ex. 4.0 at 5, LL. 97-98. On cross-examination, however, it was revealed that Mr. Hames is informed by crew coordinators of marketing locations before marketing occurs. Tr. at 89/5 (Hames). Further, the Company's corporate office in fact communicates weekly with each sales

office regarding marketing locations, detailing which specific towns, neighborhoods and zip codes will be marketed in either that week or the following week. CUB Cross Ex. 1, Tr. at 88/5-8 (Hames).

1. THE EVIDENCE DEMONSTRATES THAT USESC SALES AGENTS TARGET MARKETING EFFORTS IN LOW-INCOME AREAS

The Company's own attempts to refute the evidence of its targeted marketing efforts in fact demonstrate it unlawfully targets areas with high populations of low-income, seniors and/or non-English speakers. Mr. Hames, Regional Contractor for the Chicago Loop office, suggests that sales are heaviest in the areas where the contractors live or on the way to or from the sales office. IESC Ex. 4.0 at 5, LL. 100-101. *Id*. Mr. Hames provides a map that attempt to document this correlation between location of customers and contractors. IESC Ex. 4.3 (Hames). However, when asked on cross-examination if crew coordinators organize marketing efforts in areas close to sales agents' residences, he responded that he did not know. Tr. at 91/8 (Hames). One would expect that, if Mr. Hames was informed by crew coordinators where marketing is likely to be occurring, he would have had personal knowledge of the correlation between marketing locations and sales agents' residences, if such a correlation actually existed.

Ms. Alexander refutes Mr. Hames' conclusions based on Ex. 4.3 after examining the evidence herself. Ms. Alexander produced her own map using Company data showing the zip codes with the highest number of USESC contracts and the residences of USESC sales agents. CG Ex. 2.2 (Alexander). This map shows the opposite of the Company's conclusion; that contractors clearly market in low-income neighborhoods and not in their own towns or neighborhoods. CG Ex. 2.0 at 14, LL. 279-82. Ms. Alexander concluded that "[i]t is only when the contractor is a resident of a lower income neighborhood that he or she markets in that area." *Id*. at 14, LL. 283-84. A close examination of Mr. Hames Ex. 4.3 and Ms. Alexander's Ex. 2.2

reveals that the incidence USESC contracts clearly relates to the income of the neighborhood and not the residence of the contractor.

Though the Company denied that it targets its door-to-door marketing efforts to non-English speakers and senior citizens in its Answer (para. 20) and in testimony, (IESC Ex. 3.0 at 9. IESC Ex. 4.0 at 5-6), the evidence demonstrates the contrary. Mr. Hames' contention that the Company does not determine where sales agents market is belied by the evidence. IESC Ex. 4.0 at 5, LL. 97. As discussed above, crew coordinators are experienced sales agents who essentially assist the Regional Distributor in contractor-related marketing services. CG Ex. 2.0 at 16, LL. 312-314. Since crew coordinators and Regional Distributors operate pursuant to an independent contractor agreement and are agents of the Company, USESC cannot divorce itself from their marketing strategies. Thus, either the Company is demonstrating willful ignorance or is simply not being truthful with regard to its knowledge of its agent's marketing intentions before the fact.

CUB witness Bryan McDaniel further corroborates Ms. Alexander's Ex. 2.2 by presenting his own analysis of where sales agents plan marketing activity. Mr. McDaniel mapped the City of Chicago zip codes provided in the weekly email communications between the sales offices and the Ontario corporate office. There are 13 zip codes that where targeted by USESC's sales agents more than 30 times, and more than any other zip codes in Chicago, from February 2007 until December of 2008. Mr. McDaniel mapped these zip codes, which shows that USESC's marketing efforts during 2007 and 2008 predominantly targeted the south and west sides of Chicago, which consists largely of low income, minority communities. CUB Exhibit 8.3 shows the 10 poorest and the 10 richest zip codes in Chicago and the number of USESC marketing efforts within those zip codes. The data shows that there were significantly

more marketing efforts in the poorest ten zip codes compared to the richest ten zip codes. CUB Ex. 8.0 at 7, LL. 168-71; CUB Ex. 8.3.

Further corroborating this evidence, Ms. Jodlowska, for the BBB, testified that many of the complainants she was familiar with were minorities, particularly Spanish speakers. CUB Ex. 1.0 at 6, LL. 119-120. She also noticed that certain areas were targeted by U.S. energy workers, specifically the South Side of Chicago. Many of the complainants appeared to come from lower income areas. Based on her observations, she opined that the Company targeted those people who would be least likely to understand the contract that was being presented to them, and people that were most vulnerable to misrepresentation. CUB Ex. 1.0 at 7, LL. 122-125.

2. USESC'S HIGH RATE OF CONTRACT REFUSAL DUE TO CREDIT UNWORTHINESS FURTHER DEMONSTRATES USESC'S KNOWLEDGE OF LOW-INCOME TARGETING

Further evidence of the Company's targeting of low-income communities can be found in an analysis of the company's credit acceptance ratios. As Ms. Alexander explained, there is a significant disparity between the number of customers who sign contracts with USESC and those remain customers with USESC. CG Ex. 2.0 at 21, LL. 434-38. The Company's own data responses show that approximately 28 % of signed contracts since 2005 have been rejected for credit reasons. *Id*.

In discovery, USESC also provided a document labeled "Illinois Gas-Credit Acceptance Ratios," which shows the percentage of contracts accepted by zip code. CUB Cross Ex. 11. As Mr. Potter acknowledged during cross-examination, the credit acceptance ratios reported by the Company range from a high of 97.79 percent to a low of 31 percent. Tr. at 439/17-20 (Potter). As discussed previously, CUB Witness McDaniel performed an analysis of USESC marketing efforts and identified the 13 Chicago-area zip codes targeted most heavily by USESC sales agents. CG Ex. 8.0 at 7, LL. 161–163. The analysis of the company's credit acceptance ratios,

(as detailed in CUB Cross Exhibit 11) shows that in the 13 zip codes identified by Mr. McDaniel, the ratios range from a high of 53.70 % to a low of 31.54 %, the lower half of the credit acceptance ratio range. CUB Cross Ex. 7.

Despite the strong correlation, USESC continues to insist it does not target low-income communities. However, when asked about the above analysis, USESC witness Potter could not refute it. Tr. at 447/4 (Potter). However, this evidence shows that – at a minimum – the Company knew a significant portion of its contracts were coming from areas that have a very high ratio of contracts being rejected for credit unworthiness.

E. REMEDIES

As represented in more detail in Section VII below, CUB/AARP request that the Commission revoke USESC's certificate of service authority and prohibit USESC from marketing, selling or otherwise entering into contracts with Illinois consumers. The Commission has this authority pursuant to Section 19-120(c)(3) of the PUA. Alternatively, CUB/AARP recommend the Commission issue a cease and desist order, pursuant to Section 19-120(c)(1), until a management audit is performed, or to modify USESC's certificate of service authority, pursuant to Section 19-120(c)(3) to prohibit USESC from door-to-door marketing. Additional remedies are detailed in Section VII below.

IV. USESC VIOLATED THE ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT

A. LEGAL STANDARD

The AGSL, Section 10-110(e)(5), requires AGSs to comply with "all other applicable laws and rules." The Illinois Consumer Fraud and Deceptive Business Practices Act ("CFA") prohibits unfair methods of competition and unfair or deceptive acts or practices, including:

> the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression of omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact… in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby.

815 ILCS 505/2. To be material under Illinois law, the misrepresented fact must be essential to the transaction between the parties. *Mack v. Plaza Dewitt Ltd. Partnership*, 137 Ill.App.3d 343, (1985). The CFA further prohibits misrepresentation in any manner regarding the consumer's right to cancel where "a sale of merchandise involving $25 or more is made or contracted to be made whether under a single contract or under multiple contracts, to a consumer by a seller who is physically present at the consumer's residence…" 815 ILCS 505/2B. These provisions correspond to paragraph 29 of the CUB/AARP Complaint.

To state a cause of action under section 2 of the CFA, a plaintiff must allege: (1) a deceptive act or practice by defendant; (2) defendant's intent that plaintiff rely on the deception; and (3) that the deception occurred in the course of conduct involving trade and commerce. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 490 (1996). There is no "honest mistake" defense to a claim brought under the Consumer Fraud Act. The appellate court has consistently and repeatedly held that even innocent or negligent misrepresentations are actionable. See, *e.g.*, *Sohaey v. Van Cura*, 240 Ill. App. 3d 266, 291 (1992), aff'd & remanded, 158 Ill. 2d 375 (1994); *Smith v. Prime Cable*, 276 Ill. App. 3d 843, 856 (1995); *Griffin v. Universal Casualty Co.*, 274 Ill. App. 3d 1056, 1065 (1995); *Warren v. LeMay*, 142 Ill. App. 3d550, 566 (1986). Under the Consumer Fraud Act, the good or bad faith of the defendant is irrelevant. *Harkala v. Wildwood Realty, Inc.*, 200 Ill. App. 3d 447, 453 (1990). Accordingly, an intent to deceive is not necessary

to a finding of unfair or deceptive conduct within the meaning of the statute. *People ex rel. Hartigan v. Stianos*, 131 Ill. App. 3d 575, 578-79 (1985); *Warren*, 142 Ill. App. 3d at 566.

In this case, the CUB Complaints analyzed by Ms. Alexander and the Company's allegation data regarding sales agent misrepresentations satisfy the first element, a deceptive act or practice. The second element regarding intent to mislead is also satisfied, based on the facts surrounding the statements. The third element – that the deception occurred in the course of commerce – is self-evident from the facts described herein, including that the Company admits to being a retail gas supplier in the business of selling gas supply contracts to residential and business customers in Illinois. USESC Answer to Complaint at 2.

B. CUB'S, THE COMMISSION'S AND THE COMPANY'S OWN COMPLAINTS OVERWHELMINGLY SHOW A PATTERN OF DECEPTIVE AND MISLEADING MARKETING TACTICS

In preparation for her Direct Testimony, Ms. Alexander analyzed 232 CUB Complaints in order to discern any patterns of allegations. Her analysis lead her to conclude that sales agents are not, in fact, "sticking to the script," following official training materials, or the Code of Conduct. Instead, based on the allegations in the CUB Complaints, sales agents tell customers that they can "save money" or "lower their bills" or "lock in lower prices." *Id*. at 23, LL. 461-63. Customers were also told that the USESC sales agent was connected in some way with the utility, the ICC, CUB or a government agency. *Id*. at 25, LL. 500-03. Based on the Company's own training material and its Code of Conduct, such promises are explicitly prohibited. Thus, the sales agents using such sales tactics knew at the time the statements were not true, not approved, but said them anyway.

Ms. Alexander concluded from her analysis that the fact that 51% of the CUB Complaints she reviewed alleged the same "story" or "experience" with USESC sales agents "is

a clear indication that a pattern or practice exists in which USESC sales agents attempt to sell their product by promising benefits that are not true and that USESC knew was not true at the time these sales were consummated." *Id*. at 23, LL. 464-68. The Company's own allegation data shows 1,730 valid instances of misrepresentation of price, savings, the nature of the contract, or the relationship between USESC and the gas utility in 2007 and 2008 alone. CG Ex. 3.0 at 25, LL. 487-88.

C. THE EVIDENCE DEMONSTRATES USESC SALES AGENTS INTENDED TO MISLEAD CUSTOMERS TO MAKE SALES.

Ms. Alexander testified that sales agents are incented to make contracts to obtain commissions and are therefore subject to the obvious temptation to obtain contracts without authorization or based on misleading statements at the door. CG Ex. 1.0 at 17, LL. 331-32. As Ms. Alexander and Staff witness Agnew concur, statements made by a sales agent in person, on the customer's doorstep, carry far more weight with consumers than the fine print of a contract, marketing material or statements made in a verification call. *Id*. at 17, LL. 333-34; Tr. at 913/17 (Agnew). Mr. Agnew testified that:

> I believe that the face-to-face presence, the presence of the sales agent being there physically, with the customer, is a much stronger thing than (sic) any phone call or piece of paper that any of us could look at. I don't believe that it automatically disqualifies the sales agent from having said things that don't follow what Mr. Potter would like them to follow.

Tr. at 913/21 (Agnew). The CUB Complaints validate these concerns and show a substantial number of customers alleging that the USESC sales agent either told them explicitly or implied that they would save money by purchasing USESC's long-term fixed-priced product, thereby inducing the customer to sign a contract. CG Ex. 1.0 at 23, LL. 460-468. The Company's own complaint data establishes volumes of verified allegations regarding sales agent misconduct.

Ms. Alexander analyzed USESC's product offerings marketed during 2007 and 2008 and compared them to the historical prices charged by the three relevant utilities. Ms. Alexander relied, in part, on CUB's Gas Market Monitor, a tool on CUB's website that provides data on AGS offers and utility purchased gas adjustment ("PGA") regulated rates. CG Ex. 1.0 at 20, LL. 397-403. She determined that the vast majority of USESC's products resulted in customers paying significantly more than what they would have otherwise paid to the utility. *Id*. at 20, LL. 409-11. In fact, the prices charged by USESC are far above the prices charged by the regulated utility at the time of the sale. *Id*. at 20, LL. 412-13. Mr. Potter himself confirms that "generally, though not always USESC's fixed rate is higher than the monthly rate offered by the utility. IESC Ex. 1.0 at 4, LL. 83-84. Ms. Alexander concluded, as a result, that "there is no reasonable person who could market USESC's product in 2007 by suggesting that a customer would 'save' money or that the price for natural gas supply charged by USESC was an economic benefit to residential customers." CG Ex. 1.0 at 21, LL. 415-18.

USESC sales agent training materials instruct sales agents not to promise savings, and instead to describe the long-term fixed price product as providing "price stability," "peace of mind," or as avoiding "volatility" of the utility's natural gas supply. *Id*. at 22, LL. 436-440. However, as discussed in Section III.A. above, USESC management has not conducted field visits in any comprehensive manner and therefore sales agent activity at the doorstep goes largely unsupervised. The CUB Complaints and USESC's own evidence of sales agent misconduct indicate a pattern of USESC sales agents failing to, in many cases, comply with USESC's Code of Conduct.

Ms. Jodlowska testified that the BBB had experienced a high level of consumer complaints alleging misrepresentation of savings beginning in 2005. As a result, the BBB asked

USESC to substantiate its offer of "savings" based on a five year plan by providing the BBB with the names, addresses, and phone numbers of ten consumers who enjoyed financial savings while enrolled in the company's program over a net period of 12 consecutive months, as compared to their original price-fluctuating program, which they failed to do. CUB Ex. 1.0 at 5. Additionally, the BBB requested a monthly breakdown of comparative savings for the aforementioned time period for each of the consumers. *Id*. USESC failed to provide the requested information. *Id*. USESC was marked with an unsatisfactory rating and was not accredited by the BBB. CUB Ex. 1.0 at 5, LL. 87-89.

Considering the product USESC sells is almost always priced higher than the utility PGA rate, (IESC Ex. 1.0 at 4, LL. 83-84), and the sales agents work strictly on commission, there can be no other reasonable explanation for the alleged statements other than the sales agent intended for the consumer to rely on statements of implied or promised savings to make a sale. And the evidence in this proceeding demonstrates that customers are, in fact, in many cases induced to sign a contract with USESC based on these false promises. Based on her detailed analysis of 232 of CUB's complaints, Ms. Alexander concluded that "a pattern or practice exists in which USESC sales agents attempt to sell their product by promising benefits that are not true and that USESC knew was not true at the time these sales were consummated. CG Ex. 1.0 at 23-25, LL. 464-95. Of just the 232 CUB complaints Ms. Alexander reviewed for her Direct Testimony, 118 related to promised savings or bill reduction, 45 related to USESC misrepresentation of affiliation with USESC, 42 related to customers with a vulnerable condition, and 18 related to allegations of slamming. *Id*. at 7, LL. 133.

D. USESC MISREPRESENTED THE AMOUNT AND EXISTENCE OF TERMINATION FEES

Evidence that the Company discriminatorily applied its cancelation policies demonstrates a separate violation of the CFA, because customers may be misled on their rights or made to believe that they cannot cancel without penalty when in some cases the Company does not actually intend to levy that penalty. See Complaint at 25(b); CG Ex. 1.0C at 34-35, LL. 707-710. This violated the CFA prohibition on misrepresentation in any manner regarding the consumer's right to cancel. 815 ILCS 505/2B.

E. REMEDIES

The Commission has jurisdiction to determine whether USESC violated the CFA and to grant the relief requested in CUB/AARP's Complaint. In determining whether an action falls within the exclusive jurisdiction of the Commission, courts have consistently focused on the nature of the relief sought rather than the basis for seeking relief. *Village of Evergreen Park*, 296 Ill. App. 3d 810; *Chicago ex rel. Thrasher v. Commonwealth Edison Company*, 159 Ill. App. 3d 1076 (1987). Here, the relief requested relates only to the Commission's jurisdiction under the PUA. CUB/AARP do not seek any remedies available under the CFA. Nonetheless, Illinois courts may exercise discretion in awarding "actual economic damages or any other relief which it deems proper" to a person who suffers actual damage as the result of a violation of the Act. 815 ILCS 505/10a(a).

As represented in more detail in Section VII below, CUB/AARP request that the Commission revoke USESC's certificate of service authority and prohibit USESC from marketing, selling or otherwise entering into contracts with Illinois consumers. The Commission has this authority pursuant to Section 19-120(c)(3) of the PUA. Alternatively, CUB/AARP recommend the Commission issue a cease and desist order, pursuant to Section 19-120(c)(1), until a management audit is performed, or to modify USESC's certificate of service authority,

pursuant to Section 19-120(c)(3) to prohibit USESC from door-to-door marketing. Additional remedies are detailed in Section VII below.

V. USESC VIOLATED THE ILLINOIS DECEPTIVE TRADE PRACTICES ACT

A. USESC'S DOCUMENT MARKETING ABUSES REPRESENT UNAUTHORIZED DECEPTIVE TRADE PRACTICE

The Uniform Deceptive Trade Practices Act ("DTPA") specifically outlines prohibited practices, stating:

> [A] person engages in a deceptive trade practice when in the course of his or her business, vocation, or occupation, the person:
> …
> (2) causes likelihood of confusion or misunderstanding as to the source, sponsorship, approval or certification of goods and services;
>
> (3) causes likelihood of confusion or misunderstanding as to affiliation, connection, or association with or certification by another;
> …
> (5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have;
> …
> (12) engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding.

815 ILCS 510/2. These provisions correspond to paragraph 31 of the CUB/AARP Complaint.

Under the Illinois Uniform Deceptive Trade Practices Act, a person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, the person:

(1) passes off goods or services as those of another;

(2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of those goods or services;

(3) causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with or certification by another;

(5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have; or

(12) engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding.

815 ILCS 510/2(a)(1-3, 5, 12).

In order to prevail under the Deceptive Trade Practices Act, 815 ILCS 510/2, a plaintiff need not prove actual confusion or misunderstanding. 815 ILCS 510/2(b). The Deceptive Trade Practices Act does not require proof of "monetary damages, loss of profit, or intent to deceive" to merit injunctive relief. 815 ILCS 510/3. A person likely to be damaged by a deceptive trade practice of another may be granted injunctive relief upon terms that the court considers reasonable. 815 ILCS 510/3. In *Chicago Pizza Inc. et al. v. Chicago Pizza Franchise Limited USA, et al.*, 384 Ill. App. 3d 849, 866, the Court ruled that plaintiffs demonstrated that defendants' trade practices created a likelihood of confusion or misunderstanding. Specifically, defendants' use of a similarly-named pizza restaurant and similar advertising material created not only a likelihood of confusion between the two restaurants, but also actual confusion. *Id*. at 867.

Here, USESC sales agents have purported to be from the utility, CUB or the ICC, all of which either are, or are involved with regulating utility gas service. Customers have experienced actual confusion as a result. See CUB Ex. 4.0 at 1-2, LL. 17-28, CG Ex. 1.0 at 25, LL. 500-12. Considering the number of customers who sought to cancel, alleging misrepresentation or misunderstanding of USESC's product, Ms. Alexander concluded that the level of cancelation rate reflects the fact that "customers simply do not understand or are not aware of the difference between USESC's contract price and the utility price, a confusion that is deliberately emphasized by USESC sales agents." CG Ex. 1.0 at 30, LL. 621-626. Ms. Alexander's analysis of the CUB Complaints demonstrates that USESC's sales practices create a likelihood of confusion of USESC's product and corporate affiliation. The Commission should therefore find violations of the DTPA for the 1,730 valid instances of misrepresentations during 2007 and 2008.

B. REMEDIES

The Commission has jurisdiction to determine whether USESC violated the DTPA and to grant the relief requested in CUB/AARP's Complaint. In determining whether an action falls within the exclusive jurisdiction of the Commission, courts have consistently focused on the nature of the relief sought rather than the basis for seeking relief. *Village of Evergreen Park*, 296 Ill. App. 3d 810, 695 N.E.2d 1339; *Chicago ex rel. Thrasher v. Commonwealth Edison Company*, 159 Ill. App. 3d 1076, 513 N.E.2d 460 (1987). Here, the relief requested relates only to the Commission's jurisdiction under the PUA. CUB/AARP do not seek any remedies available under the DTPA.

As represented in more detail in Section VII below, CUB/AARP request that the Commission revoke USESC's certificate of service authority and prohibit USESC from marketing, selling or otherwise entering into contracts with Illinois consumers. The Commission

has this authority pursuant to Section 19-120(c)(3) of the PUA. Alternatively, CUB/AARP recommend the Commission issue a cease and desist order, pursuant to Section 19-120(c)(1), until a management audit is performed, or to modify USESC's certificate of service authority, pursuant to Section 19-120(c)(3) to prohibit USESC from door-to-door marketing. Additional remedies are detailed in Section VII below.

VI. USESC VIOLATED THE PROHIBITION AGAINST UNREASONABLE LIQUIDATED DAMAGES

Illinois contract law proscribes that damages for breach by either party may be liquidated in the agreement only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof or loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty. In Illinois, a liquidated damages clause is valid and enforceable when: "(1) the actual damages from a breach are difficult to measure at the time the contract was made; and (2) the specified amount of damages is reasonable in light of the anticipated or actual loss caused by the breach." *Id*. at 562; see also *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1289 (7th Cir.1985). Further, while "[t]he distinction between a penalty and liquidated damages is not an easy one to draw," close cases will be resolved in favor of finding the disputed clause a penalty. *Lake River Corp*., 769 F.2d at 1290.

In *United Order of Am. Bricklayers and Stone Masons Union No. 21 v. Thorleif Larsen & Son, Inc*., 519 F.2d 331, 333 (7th Cir. 1975) (*quoting* S. Williston, Williston On Contracts sec. 778 (1961)), the court stated that the definition of a penalty is "a sum which is disproportionate to anticipated damages which is agreed upon in order to enforce performance of the main purpose of the contract by compulsion of this very disproportion." If the purpose of the clause

fixing damages is merely to secure performance of the agreement, it will be not be upheld. *Stride v. 120 West Madison Building Corp*., 132 Ill. App. 3d 601 (1985).

USESC bases the calculation of its per therm rate on several factors, but it is principally made up of the USESC supply cost. IESC Ex. 1.0 at 5, LL. 97-98. Prior to early 2008, USESC calculated exit fees in the form of liquidated damages, "[redacted]" IESC Ex. 5.0C at 38, LL. 861-62. In 2007, for example, the Company required the customer to pay liquidated damages equal to 10 cents per therm times the remaining years or any part of a remaining year in the contract term, multiplied by the customer's annual usage in therms. CG Ex. 1.0 at 19, LL. 374-82. For example, based on the average residential usage of 1,325 therms, (from CUB's GMM), a termination fee of $662.50 would be applied if the customer terminated the contract after the 3-day grace period, but within the first year of a five year contract. *Id*.

Ms. Alexander testified that this termination fee is designed to punish customers who discovery they have paid far in excess of what they would have otherwise paid the utility. *Id*. at 30, LL. 611-17. As acknowledged by the Company, the termination fee includes the Company's lost profits, and is not reflective of its actual costs. USESC did not demonstrate it would lose any profits as a result of a cancellation of the contract, because any extra supply resulting from the lost customer could be used for other new customers or sold back into the wholesale market. *Id*., tr. at 642/8 (Alexander). Mr. Potter later confirmed this fact: that if customers were to return to the default utility provider, one source of supply of the extra gas supply needed by the utility to serve these customers would, in fact, be from the Company itself, since it could sell that gas back into the wholesale market. Tr. at 753/11 (Potter).

Although USESC changed the termination provision in early 2008 (to $75 for each remaining year on the contract)(IESC Ex. 1.0 at 14, LL. 296-99), and again this Spring, (to $50 total)(Tr. at 942/19 (Agnew)), those customers that signed contracts from 2004 to early 2008 are still customers, are subject to the liquidated damages provision complained of here.

A. REMEDIES FOR VIOLATION OF PROHIBITION AGAINST UNREASONABLE LIQUIDATED DAMAGES

CUB/AARP request that those customers who remain USESC customers and are subject to the liquidated damages provision that existed prior to February 2008 be allowed to cancel their contracts without penalty. Pursuant to the AG Settlement, this remedy was available to those customers who had contracted with USESC during 2007 and 2008, or who had previously complained to the Company or a third party, or who was a senior or non-English speaker. Pursuant to the settlement of the 2006 CUB Complaint, customers who signed 2006 and earlier were allowed to cancel their contracts without penalty. However, not all customers were captured in these settlements. It is conceivable that a customer was not eligible or did not receive the claim form in either case. Thus, any customer still subject to the unreasonable liquidated damages clause should be allowed to cancel without penalty.

VII. USESC VIOLATED THE SUPPLIER STANDARDS OF CONDUCT

The utilities' tariffs require USESC to "adhere to any applicable truth in advertising laws." Nicor Tariff Rider 16, 1st Revised Sheet 75.9.1; Peoples Gas Tariff Rider AGG, 2nd Revised Sheet 162.1, p. 11; North Shore Tariff Rider AGG, 2nd Revised Sheet 144, p.11. Such applicable truth-in-advertising laws include the Illinois Consumer Fraud Act. CUB/AARP restate the facts and argument in Section IV. above, relating to USESC's violation of the Illinois CFA. Because the CFA is an "applicable truth-in-advertising law," USESC is therefore in

violation of the Supplier Standards of Conduct. USESC has failed to "establish customer complaint procedures and respond to complaints promptly," as required by the Standards of Conduct. *Id*. USESC itself admits to a case-by-case, disaggregated, "multi-departmental" approach to responding to consumer complaints. IESC Ex. 16, LL. 352-53.

The utilities' Standards of Conduct tariffs specify that "[f]ailure to comply with the Standards of Conduct is a basis for removal as a qualified Supplier under Choices for You." Nicor Tariff Rider 16, 1st Revised Sheet 75.9.1; Peoples Gas Tariff Rider AGG, 2nd Revised Sheet 162.1, p. 11; North Shore Tariff Rider AGG, 2nd Revised Sheet 144, p.11. Any party may file a complaint pursuant to Section 10-108 of the PUA seeking this remedy. 220 ILCS 5/10-108. CUB's Complaint was filed pursuant to the AGSL, which specifies that the Commission has jurisdiction under Article X of the PUA to entertain and dispose of any complaint against any AGS alleging that the AGS violated or is in nonconformance with any applicable provisions of Section 19-110 or 19-115. 220 ILCS 5/19-120(b).

A. REMEDIES FOR VIOLATION OF SUPPLIER STANDARDS OF CONDUCT

CUB requests that the Commission exercise its authority under the Section 19-120(b) and 10-108, and remove USESC as a qualified supplier under each of the respective utility's choice tariffs.

VIII. REMEDIES - GENERAL

In response to a growing number of consumer complaints regarding misleading marketing strategies by AGSs, in January 2009, the Illinois General Assembly passed an amendment to the Alternative Gas Supplier Law (SB 171) requiring marketers to provide clear disclosure of prices, terms, and conditions of all products and services in their sale solicitations.

This legislation also prohibits suppliers from misrepresenting themselves as a gas utility, governmental body or consumer group, and provides consumers with rights to cancel service from 10 days after the gas utility notifies them of a switch and also from 10 days after the date of the first bill if they find that the service is not as promised. The amendment details the issues the Commission may consider in determining whether an AGS has sufficient technical, financial and managerial resources to provide service.

A. THE AG-USESC SETTLEMENT LARGELY MIRRORS THE NEW AGSL AND DOES NOT PROVIDE SUFFICIENT REASSURANCE THAT UNLAWFUL MARKETING BEHAVIOR WILL DIMINISH

While USESC agreed to some business changes in its settlement with the AG, most of these changes conveniently overlap with the changes in the new Alternative Gas Supplier Law (SB 171), and therefore do not impose additional obligations. USESC agreed to the following in the Settlement: (i) disclosure of the salesperson's name at the door; (ii) disclosure that USESC is an alternative gas supplier that has no affiliation with the public utility, the government, or any consumer group; (iii) disclosure that any early termination fee will not exceed $50; (iv) they shall not make promises of savings; (v) disclosure the rate that the consumer will be charged for the supply of natural gas; (vi) they shall conduct the solicitation in a language spoken and understood by the consumer; and disclosure that the consumer has the right to cancel without any early termination fee within ten business days after the date of the first bill issued to the customer. AG-USESC Settlement at 6. These provisions are all included in the recent amendment to the AGSL. 220 ILCS 5/19-115.

USESC further agrees to obtain a signed and dated authorization from the customer requesting the natural gas provider change; an independent third party must obtain the customer's oral authorization to change providers; automated third-party verification systems

and 3-way conference calls may be used for verification purposes; all third-party verifications shall elicit the identity of the customer, confirmation that the person is authorized and wants to make the change, the service address of the service to be switched, and the price of the service and termination fees; and all third party verifications shall be conducted in the same language that was used in the sales transaction and shall be recorded. AG Settlement at 9. Again, these proposed changes mirror the AGSL identically.

These provisions, while important safeguards, do not resolve the issues with USESC's insufficient management of its sales force. Staff witness James Agnew recommended that USESC be required to have a permanent managerial presence in Illinois. Staff Ex. 2.0 at 7, L. 13. When asked to expand on what Mr. Agnew meant by a permanent managerial presence, Mr. Agnew testified that the newly appointed compliance manager "may have some trouble" managing 130 contractors, considering one of the Company's Regional Distributors, Mr. Hames, testified that he could not manage more than 10 people at once, and had trouble with a greater number of crew coordinators. Tr. at 951/5 (Agnew).

B. CUB/AARP RECOMMEND THE COMMISSION ORDER REMEDIES SUFFICIENT TO MATCH THE HARM TO ILLINOIS CONSUMERS

Pursuant to its authority under the AGSL, CUB/AARP request that the Commission revoke USESC's certificate of service authority and order USESC's to cease its Illinois operations. The evidence demonstrates that violations of the AGSL were substantial and repeated, ranging from managerial incompetence throughout 2007 and 2008 (violation of 220 ILCS 19-110(e)(1)), to the Company's own evidence of 1,845 validly-determined allegations of misrepresentation and slamming, to the 232 instances of misrepresentation and slamming identified in Ms. Alexander's direct testimony (violations of 220 ILCS 19-110(e)(2) and 19-115(c)), uncontroverted evidence that Ms. Vargas was slammed, (violations of 220 ILCS 19-

115(c)), and Mr. Zermeno's testimony regarding his experience with a USESC sales contractor (violations of 220 ILCS 19-110(e)(2)). The recent changes to USESC's business processes and management structure are insignificant and have not been demonstrated to be effective at resolving the issues identified above. Therefore, strong action is required to halt further harm to Illinois consumers.

USESC's history of refusing to undertake actions on its own accord and its refusal to provide information sought by the parties in a complete and timely manner provide little assurance to the Commission that the Company can be trusted to make the necessary changes regarding the management of its sales force to prevent further marketing abuses. Thus, if the Commission determines that revocation of USESC's certificate is not warranted, CUB/AARP alternatively request that the Commission issue a cease and desist order, pursuant to 220 ILCS 5/19-120(c)(1), to prevent USESC from marketing its product door-to-door, and conduct an independent management audit of USESC's management and oversight of its marketing and sales practices, to be performed at USESC's expense, or modify USESC's certificate of service authority to prohibit door-to-door marketing.

If a management audit is ordered, it should include, at a minimum, assessing the training, marketing and complaint-tracking practices and procedures of the Company aimed at preventing customer confusion and reducing the level of Complaints. The audit should examine recent complaint trends, and determine actions to strengthen management review and controls. USESC should be required to implement any recommendations resulting from the audit before being allowed to again market its product door-to-door.

If the Commission declines to order a cease and desist of USESC's marketing activity, CUB/AARP strongly recommend a sales and management audit be ordered to conduct, at a

minimum, monthly compliance audits of the implementation and effectiveness of (a) the Company's complaint tracking and review process, (b) sales training process, including the implementation and effectiveness of the Sales & Compliance Manager (pursuant to the AG Settlement), (c) the complaint analysis, (d) the third party verification process, and (e) sales agent compliance with the Code.

If the Commission declines to revoke USESC's certificate, issue a cease and desist, or order either audit, CUB recommends the Commission include in its order the following directives, at a minimum:

- With respect to print promotional materials, any information regarding utility pricing should not be stated as an average of the prices of more than one local utility;
- Any graph-style depiction of prices should not depict any future price of the local utility and should not depict or otherwise suggest that a local utility's future prices will be higher than the last month for which the price is known;
- Company should update its print promotional materials containing utility pricing at least quarterly, and all graphs depicting utility prices shall display 5 years of data in no greater than quarterly increments;
- Before implementing any changes in written sales materials or contracts (other than changes in the contract price), USESC should be required to submit the changes to ICC Staff;
- No sales agent should be on the customer's premises during any verification call and no sales agent should contact the customer again for a period of at least 10 days following a failed verification.

- The third party verification script should include confirmation from the customer that the sales agent is not present before the verification portion of the call begins.

In any case, CUB/AARP also recommend that the Commission assess penalties of up to $10,000 per violation. CUB/AARP submit that an appropriate calculation of penalties in this case is to use the Company's own records of valid instances of misrepresentation and unauthorized signatures at a minimum, which totals 1,845 during 2007-2008 (1,730 valid instances of misrepresentation and 115 instances of unauthorized signature), or alternatively, the 232 CUB Complaints analyzed in Ms. Alexander's Direct Testimony, also alleging misrepresentation and unauthorized signature. In accordance with Section 19-120(c)(2)(ii), CUB/AARP further request that the Commission impose financial penalties in the amount of $30,000 per day for those violations or nonconformances which continue after the Commission issues a cease and desist order.

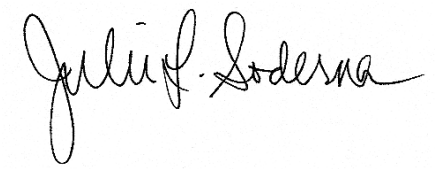
IX. CONCLUSION

WHEREFORE, CUB/AARP respectively request the Commission grant the relief requested herein and revoke the certificate of convenience of USESC.

Respectfully submitted,

CITIZENS UTILITY BOARD

Dated: December 7, 2009



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