STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Citizens Utility Board, Citizen Action/Illinois, and AARP vs. Illinois Energy Savings Corp., d/b/a U.S. Energy Savings Corp. Complaint pursuant to 220 ILCS 5/19-110 or 19-115	)))))))))))	No. 08-0175

<u>PUBLIC REDACTED</u>
REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

(Confidential Noted With **)

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NOW COMES Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, pursuant to Section 200.830 of the Illinois Commerce Commission's ("Commission") Rules of Practice (83 Ill. Adm. Code 200.830), and respectfully submits its Reply Brief.

I. Introduction

On March 3, 2008, the Citizens Utility Board ("CUB"), Citizen Action/Illinois, and AARP filed a Verified Original Complaint against Illinois Energy Savings Corp. d/b/a U.S. Energy Savings Corp. ("USESC" or "Company") On December 3, 2008, CUB and AARP (collectively, "Petitioners" or "Complainants") filed a Verified First Amended Complaint ("Complaint"), which removed Citizen Action/Illinois as one of the parties. In the Complaint, Petitioners alleged, among other things, violations of the Alternative Gas Supplier Law (220 ILCS 5/19/100 *et seq.*) ("AGS Law") of the Public Utilities Act ("PUA"), the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS

505/1 *et seq*.) ("CFA"), and the Illinois Deceptive Trade Practices Act (815 ILCS 510/1 *et seq*.) ("DTPA").

On December 7, 2009, Complainants, USESC, and Staff all filed initial briefs in this matter. In its initial brief, Staff addressed Counts IV, V, and VI of Petitioners' Complaint and offered its recommendations regarding respective remedies. Staff also limited its testimony and arguments to the period that Staff believes is relevant to the Complaint, namely those complaints made against USESC during the timeframe from January 2007 through March 2008 ("Complaint Period"). This reply brief will be similarly limited in scope. While Staff has continued to assign arguments to the particular Count to which they appear to relate, this has not always been an easy task since some arguments appeared to overlap in other parties' initial briefs. Staff, therefore, asks that Staff's arguments not be confined to the Counts under which they appear unless all parties are also so constrained.

II. COUNT IV – Violations of the AGS Law

A. <u>Managerial Failures Under AGS Law Do Not Depend on Proof of Fraud</u>

In its Initial Brief, the Company argues that Complainants failed to prove their allegations that the Company lacked sufficient managerial resources and abilities under the AGS Law. (USESC IB, pp. 10-11) Staff will address these Company arguments, some of which apply to Staff's testimony regarding the Company's managerial failures and some of which conspicuously do not. The Company characterizes the Complainants' theory regarding the Company's managerial failures as follows: "…an AGS with sufficient managerial resources and abilities would not have any ongoing fraudulent conduct by sales contractors, because as soon as such misconduct occurred, management would recognize it and takes [sic] steps to prevent its reoccurrence. " (Id, p. 10) Speaking for Staff, the Company mischaracterizes the extent of the burden to prove a violation of Sections 19-115(b)(2) and 19-110(e)(1) of the AGS Law, identified in Counts IV of the Complaint.

Certainly, the failure to correct ongoing fraudulent conduct would be a failure to maintain sufficient managerial resources and abilities as required under Sections 19-115(b)(2) and 19-110(e)(1) of the AGS Law. As we have seen in connection with Count V, ongoing fraudulent conduct would also be a failure to comply with Section 19-110(e)(5) which prohibits an AGS from failing to comply with all other applicable laws and rules. (Staff IB, pp. 24-30) For Count IV, the conduct of the Company's representatives, however, does not have to rise to the level of fraud in order to indicate a failure to maintain sufficient managerial resources under the AGS Law. To be clear, Staff is not conceding that fraudulent conduct did not occur but merely pointing out that proof of fraudulent conduct is not a prerequisite for liability under Sections 19-115(b)(2) and 19-110(e)(1) of the AGS Law. For example, management's failure to correct recurring incidents of customer confusion or any other serious problem in contracting, supplying or billing the certificated service would also be sufficient to trigger a violation under the AGS Law.

As Staff noted in its initial brief, the standard for maintaining those levels of managerial resources and abilities necessary for continued compliance with certification requirements is whether those resources are sufficient to serve the size and financial sophistication of the customers the applicant seeks to serve. (Staff IB, p. 3, citing 220 ILCS 5/19-110(e)(1)) Again, while reserving Staff's arguments that the evidence in this proceeding proves fraud, Staff nevertheless points out that ongoing failure by the Company to address something less than fraud, but still problematic, such as customer confusion, also shows that the Company had not brought sufficient managerial resources and abilities to bear on the problem and violated its obligations under the AGS Law.

The Company also mischaracterizes the extent of the burden to prove a violation of Sections 19-115(b)(2) and 19-110(e)(1) of the AGS Law, as set forth in Count IV of the Complaint, when it argues that, under the Complainants' theory, "…an AGS with sufficient managerial resources and abilities would not have ***any*** ongoing fraudulent conduct by sales contractors…" (USESC IB, p. 11) (emphasis added) Speaking for Staff, this is simply not required. No Company could prevent every instance of fraud and Staff does not consider isolated incidents of dissimilar fraud to be a failure to maintain certification levels of managerial resources and abilities. As Staff has argued throughout this proceeding, however, repeated complaints that are of a similar nature or that follow similar patterns are a "problem" that management needs to address effectively in order to continue to comply with the certification requirements of maintaining sufficient managerial resources and abilities under the AGS Law. (Staff Ex. 2.0, pp. 13-14)

B. Company Attacks on Complaints Are Invalid

The Company attacks Complainants' evidence under Count IV essentially by arguing that customer complaints do not prove fraudulent sales practices. (USESC IB, pp. 11-13) As discussed above, proving fraudulent sales practices is not necessary for Complainants or Staff to carry the burden of proving a failure to maintain sufficient managerial resources and abilities as required under the AGS Law. So, by characterizing the argument in this manner, the Company serves up a straw man only to knock it down.

Even recharacterizing the Company's argument to be more consistent with the AGS Law, the Company does not fare any better. The Company alleges that complaints are not necessarily indicative of any problem because CUB witness Alexander did not "attempt to speak with a single customer, or do anything else to verify the veracity of any customer's report." (Id., p. 12) In making this argument, the Company ignores the investigations of CUB witnesses Marcelin and English (as opposed to CUB witness Alexander) and the investigations of Staff. (CG Ex. 5.0, p. 3; Staff Ex. 1.0, pp. 3-4) Indeed, CSD Staff, generally, and Staff witness Agnew, in particular, spoke to customers complaining about the Company's sales practices and investigated their claims. Moreover, the Company ignores the expertise of both Staff and the Complainants' witnesses and essentially argues again its hearsay argument that it lost previously[1]. (See USESC IB, p. 12; Company Motion to Strike filed Sept. 22, 2009). Notwithstanding the Company's wordplay, the Commission is entitled to rely on the expertise of Staff and CUB witnesses in analyzing customer complaints. Furthermore, the CCR department of the Company does not always speak to consumers when it investigates consumer complaints against sales representatives, doing so only in certain instances. (USESC IB, p. 23)

In arguing that Complainants' strategy of "relying on unverified complaints" is nothing more than a circumvention of their burden of proof, the Company cites *Bonfield v. AAMCO Transmissions, Inc.,* 708 F.Supp. 867, 882 (N.D. Ill., 1989) for the proposition that in order to prove fraudulent conduct was occurring on an ongoing basis, the Complainants must first prove the particular instances on which fraudulent conduct

[1] Taking a misguided and bizarre tactic, the Company cites the ALJ's questions and statements at hearing as evidence that CUB witness Alexander's testimony should not be relied upon and is inadmissible hearsay, ostensibly arguing that the ALJ got the hearsay ruling wrong and that his statements at hearing prove it. (USESC IB, p. 12)

actually occurred. (USESC IB, p. 12) As discussed above, Staff's view is that fraud need not be proven to justify a failure of an AGS to maintain sufficient managerial resources under the AGS Law.

Assuming arguendo that fraud did need to be proven under Sections 19-115(b)(2) and 19-110(e)(1) of the AGS Law, *Bonfield* can easily be distinguished on a number of bases. First, as the Company indicates, *Bonfield* was superceded by a change in the Consumer Fraud Act which specifically overturned the proposition for which the Company cites *Bonfield*, namely, that a plaintiff had to prove more than an isolated course of action and needed to establish that the deceptive conduct had an effect on consumers generally. (See, *Lewis v. Hermann*, 775 F.Supp. 1137, 1153 (N.D. Ill. 1991)) (Consumer Fraud Act amended "to specifically provide that 'proof of a public injury…or an effect on consumers generally shall not be required'")

Second, the *Bonfield* court identified the plaintiff as "an experienced businessman and investor" who was looking to buy a franchise and was specifically told at a Board of Review hearing before his franchise agreement was approved that he could not rely on any statements made outside of the Board of Review hearing and the written franchise agreement. 708 F.Supp. at 877. The consumers who relied upon statements of sales representatives were not given an additional hearing nor were they specifically warned that they could not rely upon statements made outside of their contract, nor in most cases, were they experienced business people and investors. Id.

Third, the plaintiff in *Bonfield* admitted that he did not rely on such misstatements and that they did not affect his investment decision. Id. at 878. The evidence in this case, however, establishes reliance on the misrepresentations by consumers who thought that they would save money or thought they were dealing with a utility representative or otherwise believed the misrepresentations of Company sales people.

C. Company's Claims Regarding Vargas and Zermeno are Unfounded

The Company also argues that Complainants have only provided one instance, the testimony of CUB witness Vargas, that proves a sales contractor acted fraudulently and that this one lone instance of fraud is insufficient to establish that any fraudulent conduct was occurring with any frequency. (USESC IB, p. 13) Even with the addition of the testimony of CUB witness Zermeno, the veracity of which the Company questions, the Company argues that the Complainants cannot attribute wrongful conduct to the Company because in both instances, the sales representatives acted "outside of their authority and in direct violation of Company policy." (Id.) Again, Staff argues that the Company is incorrect in finding a requirement in the AGS Law that fraud or any other violation of law is necessary to indicate lack of the requisite managerial capacity. Moreover, as will be discussed more fully below by Staff in connection with Counts V and VI, the Company cannot hide behind its policies and avoid liability with respect to its agents.

With respect to Ms. Vargas' experience, the Company also fails to recognize that the verifier, a Company employee, clearly suspected fraudulent activity but proceeded to permit the sale to go through. (See CG Ex. 2.0, pp. 19-20) Thus, the Vargas case also implicates the verification process of the Company and one of its employed verifiers in the fraudulent activity. The participation of the Company verifier presents a serious breach of the Company's controls, since as the Company admits, the verification process was "designed to prevent sales contractors from falsifying a sale." (USESC IB, p. 49)

Moreover, the Company ignores the numerous consumer complaints tracked and investigated by Staff as well as Staff's expert testimony that reoccurring and similar patterns and trends of complaints indicate problems that managerial resources should be mustered to address. "To me [Staff witness Agnew], the fact that the same exact problems keep coming back over and over is an indication that management has not directed its attention sufficiently to address these ongoing issues." (ICC Staff Ex. 2.0, p. 14) Furthermore, the Company ignores its own investigations of numerous consumer complaints which found scores of failures of sales representatives to follow Company policy in predictable patterns. (See, Staff IB, pp. 28-29) This is noteworthy because the Company arguably has a bias in favor of its subcontractors due to the benefit to the Company of obtaining contracts through misrepresentations or other violations of its policy. (See, Staff's arguments in Section III of this reply brief). For the Company to argue that having policies in place is sufficient when the Company has notice that its policies are routinely violated in predictable ways, following clear trends, is irresponsible, and certainly shows insufficient management.

Finally, the Company argues that the dearth of consumer witnesses in this proceeding must lead to the conclusion that none of the other customers of the Company can offer testimony that would support the Complainants' claim, citing *Simmons v. Univ. of Chicago Hospitals and Clinics*, 162 Ill. 2d 1 (1994). The Company's argument and cite is not applicable. Unlike a Consumer Fraud Act case or a case for damages under common law, this proceeding provides for remedies under the AGS Law. None of the AGS Law remedies, including penalties, are paid to wronged consumers, as damages or otherwise; instead, penalties go to the General Revenue Fund. Thus, to spend the time and energy, including missing a day of work to attend a hearing, is a huge burden on a consumer who will not see any recompense. It takes a very motivated consumer, months after complaining about a company, to follow up with his time and energy and expense in order to try to hold a company accountable. Consequently, the fact that Complainants persuaded only two consumers to come forward and testify should not be held against their case. Furthermore, affidavits were not an acceptable alternative, as opined by the Company, because the Company never indicated that it was willing to waive cross examination of the consumer witnesses and in fact did conduct cross examination. (USESC IB, p. 13)

D. Complaints Are Evidence of Managerial Failures to Address Consumer Issues

The Company makes nine arguments against what the Company characterizes as Complainants' strategy of "equating unverified allegations with actual wrongdoing" (USESC IB, p. 14), again some of which apply to Staff's case and some of which conspicuously do not. The first argument is that customer allegations are "inherently self-serving and unreliable." (Id.) Staff's immediate response is to point out that this statement expresses an attitude that would make it very difficult for the Company to take consumer complaints seriously and to meaningfully address the consumer issues highlighted by such complaints and may provide some explanation as to why patterns of complaints are never sufficiently addressed by the Company. Certainly, customer allegations may not equate with proof of wrongdoing but they should not be dismissed as lightly as the Company appears to do – out of hand as unreliable. Patterns of complaints that consistently appear and reappear have validity as an indicator of some sort of problem that needs to be investigated and resolved even if the testimony of some customers alleging complaints has not been proven to be reliable.

In its brief, the Company evaluates the evidence in three Commission formal complaint dockets, finds it not credible and then concludes that "customer allegations are inherently self-serving and unreliable." (Id.) In each of these formal Commission cases, the Complainant failed to prove its case. The Commission relied heavily on the documentation before the consumers and held it against them for relying on the sales person and failure to read the contract. For example, in Docket No. 08-0231, the Commission found:

> After reviewing the entire record, the Commission concludes that the Complainant failed to prove its case. In light of the testimony, provided by both parties, the Complainant should have been fully informed as to the terms of the contract. It is undisputed that a contract was presented and that Complainant had at least the opportunity to review said contract. The Complainant, through his own testimony, testified that he failed to read the contract before he signed. Further, the Complainant was unable to provide any evidence that Respondent was representing itself as a government agency. (Order, Docket No. 08-0231, March 17, 2009, p. 3)

Indisputably, in evaluating an individual consumer complaint case, the Commission applies this standard. But having proof that a conversation occurred on a doorstep is not the same as being unreliable. While the Commission questioned the credibility of witnesses in these cases, clearly it was faced with a "he said, she said" situation, with no factual basis other than the contract itself to give guidance. This is a situation of the Company's own making. The Company chooses to make sales by utilizing a door to door sales force. Furthermore, the Company chooses to shun direct monitoring of that sales force that would provide evidence of what actually happens at the door step. And apparently, the Company chooses to argue that this situation insulates the Company from liability.

Moreover, the Company makes the same error that it accuses Complainants of making, namely, it forms a general conclusion based on too few cases. Similarly, the

Company argued that Complainants could not rely on the testimony from two consumers to prove their case. As Staff has discussed, the Company's argument regarding the Complainants ignores the testimony of Staff, the Company's own internal investigations and the evidence of significant reoccurring patterns of complaints and is, therefore, not persuasive. In addition, the Company is silent regarding the numerous formal complaint cases at the Commission that were settled by the Company, many of which provided credible evidence of the truth of the consumer allegations even though no liability was admitted.

Finally, it is curious to note that the Company finds the allegations of its customers "inherently self-serving and unreliable" but does not expressly find the same to be true of its sales representatives. (Id.) Indeed, the Company refers to misconduct by sales contractors in 2007 and early 2008 as traceable to nothing more than "a few bad apples." (USESC IB, p. 20) The sales representatives, however, have their livelihood at stake. Therefore, it is not a huge leap of logic that if the sales representatives were to act in the manner the Company believes consumers act, i.e., self-servingly and unreliably, misrepresenting consumers in order to achieve a sale and then lying to cover it up is likely and predictable.

Second, the Company argues that Complainants overstate their complaint numbers by including customer contacts that are merely questions rather than complaints. (USESC IB, p. 14) In this respect, Staff's procedures differ from those alleged to be the practice of the Complainants in that Staff distinguishes between customer contacts and complaints in supporting its testimony. (ICC Staff Ex. 1.0, pp. 3-4) So, even if this argument is true of Complainants, it does not apply to Staff. Further, Staff notes that a "contact" of any sort that alleges misconduct, regardless of what label is assigned to it, should be excluded from any category the Company may invent that would be simply a question from that customer. The contacts or complaints (whatever we wish to call them) that Staff has described in this proceeding are not simply questions, but rather expressions of concern or complaint.

Third, the Company argues that there is no evidence to show when customer complaints are related to a contract solicited during the period subject to a settlement agreement between CUB and the Company. Thus, the Company argues that: “Without evidence showing the date of the sale underlying each complaint, it is pure guesswork for Complainants to suggest that the ‘complaint’ totals relate to fraudulent sales conduct occurring in 2007 and early 2008.” (USESC IB, p. 15) In Staff’s view, this Company argument applies, if at all, to the complaint totals derived for purposes of finding violations of the CFA and DTPA (Counts V and VI, respectively), not Count IV which alleges failures to maintain sufficient managerial resources and abilities. Under the claim of inadequate managerial resources and abilities, the Complaint Period applies to the filing of complaints themselves, not to the timing of the underlying contracts. This is so because the Company does not have notice of issues until it receives allegations or complaints regarding the same.

In making this third argument, the Company may be arguing that such complaints may not be counted by CUB due to the settlement agreement entered into between CUB and the Company. While CUB may be subject to the terms of its settlement, Staff was not a party and is not subject to their agreement and therefore, is not so limited. Furthermore, the CUB settlement agreement is not in the record of this proceeding or the original docket and the Company did not raise this argument previously. As a result, Staff is unable to respond to this at this time. Moreover, the Commission has the authority to hear and investigate any complaint brought under Section 10-108 of the PUA, including this Complaint and the original CUB complaint, "…notwithstanding the fact that the person or corporation complained of may have satisfied the complaint." 220 ILCS 5/10-108.

Fourth, the Company attacks the accuracy of Complainants' evidence of complaint volume on two grounds, failure to take into account the Company's sales volume and failure to exclude contacts from the complaint totals, as evidenced by the cross examination of CUB witness English. (USESC IB, p. 15) Because the latter argument addresses CUB's internal procedures, Staff will defer to CUB with respect to that argument. Staff will address, however, the Company's argument that sales volume was not taken into account. The Company indicates that even if all of the 2007 complaints were taken into account (which it disputes), the Company complaint ratio (presumably, the number of complaints over the number of sales made in 2007) would be less than ****% (Id., pp. 15-16) and would not indicate "a systemic defect." (Id.)

Staff disagrees with the Company's reasoning in this instance. A complaint ratio is not relevant to the question of whether a managerial failure has occurred unless a complainant is arguing that once a complaint ratio crosses a certain threshold of reasonableness, the company is subject to liability for failure to keep complaints at that reasonable level, no matter what the content of the complaints. Neither Complainants nor Staff makes such an argument in this proceeding. Therefore, the relevance of complaint ratios is called into question.

The Company provides no support for the relevance of complaint ratios other than challenging Complainants' evidence with the charge that the volume of complaints received about the Company could be attributed to the Company's high sales volume and resulting market share. But again, neither Complainants nor Staff argues that the Company is strictly liable due to its high complaint volume; rather, the parties discuss the volume of complaints against the Company because they defend the patterns found in complaints, as based, not upon low levels of complaints or merely a few instances, but upon high volume and high sales activity. This volume gives greater credibility to the patterns found by Staff and Complainants but is not held against the Company, per se.

Moreover, volume alone is not relevant to determining managerial failures. For example, one company may have a higher complaint ratio than another company but in reviewing that company's complaints, no significant patterns emerge. Under the Company's theory, this would presumably indicate that the complaints were an indication only of high sales volume and market share. Without any patterns of complaints, Staff might well agree. If the complaints are individual and idiosyncratic and do not indicate a pattern or systemic problem, the levels may well be due to sales volume. At the very least, Staff would have a difficult time pinpointing any problem or holding the Company liable for failure to correct it. Conversely, a company can have a lower complaint ratio than another company but a review of its complaints may indicate significant and consistent patterns, reflecting communication failures or other problems that ought to be addressed by management. Thus, the content of complaints is more significant than complaint ratios alone.

The Company misunderstands why Staff and the Complainants refer to volume in their arguments. While Staff points to the significant volume of consumer complaints leveled at the Company, it is the analysis of the content of the complaints that is most compelling, the finding of similar patterns of allegations repeated, despite numerous attempts at mitigation, that most clearly point to unresolved problems and a failure of management to effectively deal with them. As Staff indicated in its initial brief:

> Large volume by itself can simply arise as a byproduct of market share, and in such instances is likely to be associated with a variety of topics. Likewise, negative consumer contacts in isolated instances may not be an indication of a developing trend or concern. However, when heavy volume (relative to the particular industry or market) is paired with a repeated set of specific and similar allegations over a sustained period of time, the situation raises concerns of a systemic failure that needs to be identified and addressed on a system-wide rather than an individual basis. (ICC Staff Ex. 1.0, p. 7)

Fifth, the Company appears to argue that Complainants must undertake a "scientific analysis" as to what number of complaints actually relate to sales methods. (USESC IB, p. 16) Staff is unaware of any statutory provision that would require such a showing, and notes that this may simply be another attempt by the company to re-assert its opinion that the pure volume of complaints compared to sales activity is the only measuring device that matters. Staff observes again that it is the repeated patterns within the volume, not the volume alone, which provides Staff with meaningful data. Although it is unclear to Staff why the Company insists that the complaints supporting management failures must "actually relate to sales methods" since Staff's case includes managerial defects outside of these categories derived from complaints unrelated to sales methods, Staff also notes that Staff did break down the complaints it received into categories that can be used to identify the number of complaints related to sales methods. (ICC Staff Ex. 1.0, p. 6)

Sixth, the Company complains that the Complainants "cannot articulate an acceptable complaint rate" arguing that without this "there is no basis to infer ongoing fraudulent conduct" from the Company's complaint rate. (USESC IB, p. 17) This argument is similar to the preceding argument and can be easily dismissed. Neither

Staff nor Complainants infer ongoing fraudulent conduct from a complaint rate so none needs to be articulated. It is the Company that would like to make that nexus in order to avoid discussion of the obvious patterns and trends of complaints by misleading with discussions of “appropriate” complaint ratios. Staff refers to complaint volume only to show that the trends found have some substance behind them; they are not based on complaints few and far between.

Seventh, the Company argues that both Complainants and Staff downplay the importance of market share or the size of the customer base when analyzing complaint numbers. The Company alleges that Staff and Complainants “prefer to discuss the numbers in isolation in order to give the impression that large numbers equal large problems.” (USESC IB, p. 17) Again, this argument is similar to the preceding two. Staff has never analyzed complaint numbers in the manner claimed by the Company and its case rests on patterns found in the content of the complaints received, rather than the absolute numbers. In fact, it is the Company that insists on analyzing complaint numbers because analyzing complaint content would indicate trends that the Company has either ignored or failed to resolve.

Eighth and perhaps most significantly, the Company argues that “there is no merit to Complainants’ claim that a pattern of complaints suggests systemic problems.” (USESC IB, p. 17) The Company finds no merit to these patterns because it believes the truth of the complaints cannot be assumed. As stated above, in Staff’s investigations, Staff does not assume every complaint or customer contact to be true. Neither does Staff assume every complaint or contact to be false. Staff simply notes that the repeated patterns identified within the volume of contacts and complaints received should be cause for concern with the Company’s management, unless its management somehow believes the trends to be the result of a vast customer conspiracy against it. In sum, the complaint trends indicate that something is amiss systemically.

Those customers that mistakenly understood, for instance, the sales message to be that the Company promised savings, still point to a valid consumer confusion issue that needs to be addressed by management. So while some complaints that form the basis for the trend may be related to a confusing message, rather than a deliberately misleading one, the Company ought to address the issue whether it believes the customers were lied to or not. Under this Count IV, unlike perhaps, Counts V and VI, each allegation does not have to be proven true in order to point to systemic problems. Furthermore, as discussed more fully in connection with Counts V and VI, the Company's own investigations provide credible evidence as to the truth of these complaints.

As a corollary to this eighth argument, the Company also argues that "the universe of complaints that customers can have about an AGS is limited to amount of the fixed price, the nature of the AGS's program and the behavior of the sales contractor" and that it is circular to contend that "because [the Company] received complaints relating to those aspects, some systemic defect existed." (USESC IB, pp. 18-19) In response, Staff notes that there is no evidence in the record to support this assertion and furthermore, the complaint categories the Company has identified are not an exhaustive list. Staff receives complaints about billing practices, payment and cancellation practices, customer service issues, credit checks, the actual provisioning of service, renewals and other categories of complaints. Moreover, even if this were an exhaustive list of the universe of complaints, Staff has not identified broad categories of complaints in its testimony but rather has found specific patterns particular to the Company and it is those specific patterns which indicate systemic defects. For instance, Staff found a trend of complaints that indicated that sales representatives identified themselves as representing the gas utility in the area. While this trend could be categorized under the broader category of "behavior" of the sales contractor, this is a very specific complaint trend that requires specific attention.

Ninth and finally, Company argues that CUB's solicitations of customer issues with USESC escalated complaint volumes against the Company and claims the practice is unfair. (USESC IB, p. 19) The Company cites published accounts in CUB's blogs and press releases, dated April 26, 2006, February 8, 2008, February 11, 2008, March 5, 2008 and June 10, 2008, respectively. Yet all of these accounts were published outside of the Complaint Period or within thirty days prior to the filing of the Complaint and therefore could have had very little effect on the complaints filed during the Complaint Period.

In addition, Staff is not subject to this criticism because it does not blog, issue press releases or otherwise solicit customers directly regarding their experience with USESC. Although there may be some overlap in complaints with CUB, some consumers complain directly to Staff alone so Staff's data is not as subject to the alleged escalated complaint volumes. Furthermore, Staff's concern with this argument is that the Company appears to want to avoid the attention to its product or its sales practices, apparently worried that shining a light upon its product and practices will bring consumers out of their ignorance and escalate complaints. In Staff's view, the Company should welcome further education for consumers about the market generally and about the Company's product in particular because the Company is charged with that educational duty in the AGS Law.

E. <u>Inadequate Management</u>

The Company argues that the regional distributors have control over their independent contractors and impose consequences accordingly. (USESC IB, pp. 22-23; USESC Ex. 5.0, p. 7 and 11) This claim, however, is overstated. Regional distributors have no authority to terminate the sales representatives and have no true managerial authority. (See ICC Staff Ex. 2.0, pp. 8-10) When asked if there was anything he could do to a bad actor besides terminating an agreement, Company witness Hames testified that he "can sit them down and take their badge away and say, 'Listen, we're not going any further until we can talk to somebody from head office.'" (Tr. at 166/2) But when prompted to disclose how many occasions he had specifically done that in the last four and a half or five years, Mr. Hames recalled that he had done it more than once but "probably not" more than five times, only a "handful of times." (Tr. at 166/11)

Evidence in this case has shown that the Company has exhibited a pattern of tolerating allegations of agent misconduct and even promoting those sales contractors who have a history of such allegations. When Company witness Nicholson was asked if he had [redacted]** (Tr. at 208/18; also see CUB Cross Ex. 5) CUB Cross Ex. 5 also shows that **[redacted]**. Keith Dean, a sales agent who worked under Company witness Hames in the downtown office, also had an allegation of a disputed signature

(Tr. at 151/5 (Hames), but was later made a recruiter at Hames' office (USESC Ex. 4.0, p. 2).[2]

F. Claims of Potential Savings Misleading

In its initial brief, the Company defends its marketing materials and practices that continue to refer to the "potential savings" of its fixed price product, as appropriate and therefore, not misleading. (USESC IB, p. 43) The Company argues that "[i]t is also unquestionable that if the price of gas continues to rise, the customer will save money. Thus, it cannot be misleading for an AGS to suggest that a consumer may save money, because the proposition is, in fact, true." (Id.) Following this statement, the Company's initial brief provides an example where a select group of consumers entered into contracts prior to the unusual spike in prices over last summer, as evidence to support this argument. (Id., pp. 43-44) Suffice it to say that the Company ignores other periods where its customers were not so lucky. While Staff does not dispute the fact that the Company has uncovered one select period of time when customers may have saved money, it is disingenuous for the Company to act as if saving money could be, by any stretch of the imagination, an appropriate and non-misleading description of the Company's fixed price product. Consequently, the Company's arguments must fail.

While there may be instances when, over the course of some carefully selected contract term, some customers of the Company's fixed term contract will save money, this product is not a money saving vehicle; it is a stability or insurance vehicle. (USESC Ex. 1.0, p. 4) If you wanted to save money on your gas supply cost, you would not buy the Company's fixed price product, for it was not designed for that purpose and is

[2] Staff notes that points are assessed against a sales contractor for validly determined complaints and some pattern of several complaints of the same nature. (Tr. at 279-281 (Findley))

unlikely to give you those results. (Id.) The Company then should not be selling this product on the basis that it may save the consumer money and to do so is misleading.

As the Company has stated often, its fixed price product reduces uncertainty by "provid[ing] stability and ease of budgeting for a monthly cost that otherwise can change, sometimes significantly, from one month to the next." (Id.) The fixed price includes a premium, **[redacted]** (Id.) If market prices go down, the consumer does not benefit from the lower prices: "Customers are often willing to pay a premium for certainty in their rates, because it means that they can avoid the risk of future increases in the price of natural gas." (Id.) Over time, this product may protect from possible price upswings (up above the fixed price) but does not permit customer participation in price downswings.

Essentially, this fixed price product is like an insurance product - wherein one pays for protection from events that may never occur (like upswings in gas prices over the fixed price that are sustained for a period long enough to make up the differential between the aggregate of the fixed price payments over comparable market prices at the customer's usage). There may be conservative consumers who want this kind of protection but the Company should explain the product to the consumer for what it is, not try to sell it to them on the basis that they may save money on gas prices. While marketing and describing this product accurately may render this product a "niche" product, utilized by a smaller group of people than those who want to save money on their gas supply, the Company cannot be permitted to engage in misleading marketing because its product may not be as attractive to a larger audience without such misleading statements.

Furthermore, the Company's marketing materials that tout the "potential" savings of its product can lead consumers to believe that the contract's warnings that "savings are not guaranteed" are simply "legalese" that is not intended to contradict the potential for savings; guarantees after all provide additional assurance that the product meets expectations but the product is still supposed to meet its expectations even without a guarantee. Furthermore, these marketing materials may similarly confuse sales representatives.

G. High Pressure Sales Can Occur Despite a Subsequent Cancellation Period

The Company claims that "the idea of the door-to-door presentation creating high-pressure sales is a myth, because the transaction is not technically concluded on the doorstep, but it is subject to cancellation for up to more than two months after the sales contractor has departed." (USESC IB, p. 45) The implication of this argument is that an after-the-fact cancellation right does not just remediate high pressure sales but the cancellation right proves that the high pressure sales activity never occurred. Obviously this is not a correct statement and should be disregarded. Furthermore, the Company, in relying on an after-the-fact cancellation policy rather than getting at the root of the problem, i.e., preventing the high pressure sales presentation from occurring in the first place, shows a failure of management.

H. Difficult Cancellation Is Not Inconsistent With a High Cancellation Rate

The Company argues that the testimony of CUB witness Alexander, which identifies a high cancellation rate, contradicts the testimony of Staff witness Agnew, which identifies significant barriers to cancellation. (USESC IB, p. 46) The Company argues that "[o]bviously cancellation cannot in the first instance be so difficult that it allows contractors to ignore compliance rules, and at the same time be so frequent that it reflects systemic problems." (Id.) Apparently conceding that its cancellation rate is high, , the Company cites, as support for its argument, its cancellation rate - ** ** - as a "statistic [that] defeats Mr. Agnew's anecdotal observation or speculation that there are systemic barriers to cancellation."[3] (Id.) Staff observes that a high cancellation rate does not mean that consumers did not have a difficult time cancelling and therefore, it is not inconsistent with the barriers to cancellation identified by Staff. Moreover, the Company provided no statistics which might actually tend to contradict Mr. Agnew's evidence, such the time frames for cancellation or the number of consumer calls or letters required in order to achieve cancellation. .

Similarly, the Company argues that Staff witness Agnew testified to complaints of "an *unknown number* of customers [which] referred to difficulty cancelling…" (USESC IB, p. 47) (emphasis added) This statement is untrue. Staff states in its direct testimony: "Many consumers (136 of the 847) reported that they could not get USESC to cancel the service, despite reporting that they had made repeated attempts to do so, or that they experienced long delays in achieving cancellation." (ICC Staff Ex. 1.0. pp. 6-7) In addition, Staff's direct testimony provided that 476 out of 847 complaints made during the Complaint Period indicated the early termination fee acted as a disincentive to cancellation. (Id., p. 6)

I. <u>The Santanna Certification Case is Not Relevant</u>

[3] With respect to the Company's characterization of Staff's evidence as "anecdotal" and "hearsay" (USESC IB. p. 46), Staff refers the reader to the contrary arguments on page 5 of this reply brief and in the ALJ's ruling with respect to the referenced Company's motion to strike CUB's testimony.

The Company characterizes Docket No. 02-0441, the Santanna Natural Gas Corp. certification case, as persuasive authority for this proceeding, arguing that the Commission, in that case took notice of, and gave significant weight to Santanna's compliance efforts "even where its past practices may have implicated shortcomings." (USESC IB, p. 64, 10) The Santana certification case is inapposite. While the Commission did indeed issue a certificate to Santanna, conditioned on remedial efforts, in part because of the inconvenience to Santanna's existing customer base,[4] the Commission also expected an ongoing complaint action (Docket No. 02-0245) to be available to address any wrongs, including possible AGS Law violations (it was subsequently dismissed with prejudice). As the Commission stated in its Final Order:

> However, the Commission cannot, and will not, look the other way when it comes to Santanna's business practices earlier this year. The Commission will address those concerns on two different fronts. First, the Commission urges the parties to use Docket 02-0425 to pursue remedial actions for Santanna's inappropriate business practices. Second, this certificate will not be granted without providing the proper mechanisms to ensure that those earlier actions do not repeat themselves. (Final Order, Docket No. 02-0441, November 7, 2002, p. 28)

If there is any valid analogy to be made here, it is that this complaint proceeding is analogous to the complaint proceeding against Santanna in Docket 02-0245. Therefore, the conditions to Santanna's certification are not relevant here.

J. <u>Company's Remedial Efforts Have Not Been Successful or Sustainable</u>

The Company argues that its remedial efforts have solved the problems with sales representative misrepresentations and that reduced complaints indicate the Company's successful managerial efforts. (USESC IB, p. 3) History, however, shows

[4] Santanna had been authorized to serve customers under utility tariffs approved by Commission order. A subsequent statute requiring alternative gas suppliers acting under tariff to be certified was the basis for this unusual certification proceeding.

that success, measured by reduced levels of complaints, has been ephemeral and temporary. (Tr. at 694-696 (Potter)) According to Company testimony, complaint levels were actually increased in response to measures initiated by the Company after the settlement of CUB's first complaint at the Commission. In Company witness Potter's view, due to bad publicity levels, complaints increased despite a number of managerial changes implemented by the Company in response to the settlement with CUB. (Id.) Per the Company's initial brief, "…in late 2007, the Company unilaterally took proactive steps to improve its sales contractor' performance, and its customers' understanding of the Company's fixed price program." (USESC IB, p. 20) These steps included "implementing changes to the customer contracts and sales materials, revising training materials, requiring the entire sales force to complete retraining, and intensifying oversight of the sales contractors." (Id.) And yet, increased levels of complaints formed the basis for this Complaint, which focuses on complaints brought during 2007 through mid 2008. (Tr. at 696/6 (Potter))

In response to this Complaint, the Company again initiated remedial measures. Per the Company, levels of complaints based on contract volume (sometimes referred to as complaint ratios) were reduced after the Company initiated remedial efforts in February 2008. (USESC IB, p. 16 and 25) Notwithstanding this evidence, Staff raises two concerns. First, as shown above, managerial changes of the kind the Company has engaged in the past have not always resulted in a decrease in complaints and, even when they have, that decrease has been temporary. Second, reductions in complaint volume can be seasonal; consumers often complain only once their bills reflect winter heating costs and are large enough to get their attention. As Staff has already testified, complaint numbers for each year since December 2005 show rising levels for USESC during the months of winter and early spring, and then diminished numbers in the summer and fall. (ICC Staff Ex. 2.0, p. 15)

Despite this checkered record, the Company urges the Commission to share the Company's confidence in the success of its latest efforts. Staff does not feel so confident. Reductions in complaint ratio levels may not be sustainable and Staff urges the Commission to verify such sustainability by following Staff's recommendations set forth in its initial brief. (Staff IB, pp. 19, 23)

The Company argues that "[a]t all times, Illinois Energy's management actively instructed and monitored the sales contractors and monitored general trends." (Id., p. 20) While Staff disputes this statement, Staff notes, if it is true, the Company has proved Staff's case. If management has at all times actively instructed and monitored its sales force, then it must possess insufficient resources and abilities to do the job right, based on the Company's own measure of success, i.e., complaint volume.

Staff opines that one reason remedial efforts by the Company have failed to sustain reduced levels of complaints is because the Company does not monitor its sales representatives "at the door" and instead, relies on after the fact penalties and training measures. Efforts by the Company at eliminating misrepresentations have also focused on strengthening disclaimers in written materials and random checks of verification calls but the Company has stopped short of actually monitoring the door to door sales activity itself. (See, USESC IB, pp. 24-26) This failure to shine a light on the actual sales activity has the added bonus of making it difficult for anyone (consumers, the Company, Staff, consumer groups) to verify whether or not sales people are making false claims and certainly much of the Company's case relies upon that difficulty. (USESC IB, p. 12) Nevertheless, it seems apparent to Staff that effective monitoring at the door by a continuous method such as video or voice recordings might well resolve the problem. Alternatively, effective monitoring might be achieved by persistent, random shadowing of sales contractors, particularly if such shadowing is done with some realistic understanding of human nature, where punitive steps are taken if the sales person's rate of contract sign-ups drops significantly when shadowed and resumes normal levels without shadowing.

K. Company's Claim That It Has Implemented Staff's Recommendations Is False

The Company states in its initial brief that "..the Company has already implemented the managerial oversight, checks and systems recommended by the ICC Staff and CUB on the Company's own initiative. (USESC IB, p. 63). Staff disagrees with this statement. (Id.) In Staff's testimony, initial brief and in the final section of this reply brief, Staff continues to recommend certain managerial changes that Staff believes the Company has not yet implemented. (ICC Staff Ex. 2.0, pp.5-8). As Staff has indicated in its testimony, the Company is ultimately responsible for implementing changes to correct the problems identified in this Docket and while other parties may make recommendations, it is solely within the Company's control as to how effective any such implementation will be. (Id., p. 5) In addition, Staff remains open to any alternative solutions recommended by the Company as long as they are effective. (Id., p.19, lines 396-398) At hearing, the Company suggested that it had begun, or would soon begin, to implement changes that would satisfy Staff's and Complainant's concerns, however, the Company provided no detail as to how the Company would implement such changes. Staff posits that the devil is in the details. Consequently, Staff cannot determine that any of the changes suggested by the Company will be effective.

To reiterate, Staff continues to recommend that any changes to the Third Party Verification include two requirements (i) that the verification be performed when the salesperson in not on site or otherwise present, and (ii) that the verifier seek a separate yes or no response from the potential customer for each statement that needs to be acknowledged. For further information, Staff directs the reader's attention to the recommended verifier questions identified in Staff's rebuttal testimony. (ICC Staff Ex., p.6).

In addition, Staff recommends that the Company more fully describe the authority and responsibilities of the local manager that the Company identifies in its initial brief and at hearing. (USESC IB, p.59-60). Staff is concerned that the addition of only one manager for 130 sales agents will be inadequate for effective management and recommends that additional local management be considered. Staff also recommends that this local manager have sufficient resources and responsibility to terminate sales representatives or regional managers, and that any field shadowing performed by the manager be extensive enough to rout out the problems we have seen. Based on the record, the Commission has no information as to whether field shadowing will be daily, monthly, yearly or how many sales people will be shadowed, or whether a decrease in sales while monitored will be viewed as evidence of wrongdoing or ignored- and a host of other unknowns. Without this kind of detail, Staff cannot judge whether the Company's proposal will be effective.

Staff also continues to recommend that the Company develop an internal tracking database for complaints. (ICC Staff Ex. 2.0, p.7). While the Company has provided some indication that it documents allegations, Staff is not at all certain that the Company has developed a sufficient tracking mechanism or database. Further, Staff is also not sure its other recommendations regarding this tracking mechanism and database set forth in Staff rebuttal testimony have been implemented. (Id.) In Staff's view, there is not enough information in the record to agree that the Company has implemented Staff's recommendations.

III. COUNTS V and VI – Violations of the CFA and the DTPA

The Company is correct that the Petitioners would have to prove that the Company: 1) engaged in a deceptive act or practice; 2) with the intent that the complainant rely on the deception; 3) in the course of trade or commerce; 4) that the complainant suffered actual damage; and 5) that the deception was the proximate cause of the claimant's injury. (USESC IB, p. 67) However, the CFA must be liberally construed and a plaintiff's allegations must be viewed in the most favorable light. *Connick v. Suzuki Motor Co., Ltd., et al.*, 174 Ill.2d 482, 503 (1996).

As stated in Staff's initial brief, the CFA protects against:

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact… (815 ILCS 505/2)

The CFA specifically states that "consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act." (815 ILCS 505/2) In *Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972), the U.S. Supreme Court specifically discussed the factors considered by the Federal Trade Commission in measuring unfairness: 1) whether the practice offends public policy; 2) whether it is immoral, unethical, oppressive, or unscrupulous; and 3) whether it causes substantial injury to consumers.

Moreover, the Company's use of *People ex rel. Hartigan v. Knecht Services, Inc.*, 216 Ill.App.3d 843 (2nd Dist. 1991) is completely misplaced. In fact, this case supports Staff's and Petitioners' position regarding deceptive practices under the CFA and DTPA. In *Hartigan*, the Illinois Attorney General's Office filed a complaint against the defendants under the CFA for engaging in unfair or deceptive practices with respect to the advertising, servicing, and charging of customers in their home repair business. 216 Ill.App.3d at 847. The *Hartigan* court examined provisions of the DTPA to classify the conduct as deceptive under the CFA. Id. at 857. In determining deceptive conduct, the court stated that an advertisement would be deceptive on its face "if it creates the likelihood of deception or has the capacity to deceive." Id. The *Hartigan* court also concluded that to find misrepresentation or omission, there must be a misrepresentation of a material fact and stated that a "misrepresentation is material if it relates to a matter upon which the plaintiff could be expected to rely in determining whether to engage in the conduct in question." Id.

A. <u>Misrepresentation of Material Facts</u>

The *Connick* court clarified that "[a] material fact exists where a buyer would have acted differently knowing the information, or if it concerned the type of information upon which a buyer would be expected to rely in making a decision whether to purchase." *Connick*, 174 Ill.2d at 504. In the *Hartigan* case, the court found that the defendants' practices were deceptive in violation of the CFA because the "consumers could have been expected to rely on" the deceptive statements which were "likely to create a misunderstanding" and that the defendants intended the consumers to rely on their deception. 216 Ill.App.3d at 857. This case is extremely similar to the allegations in this proceeding.

The Company, pursuant to Section 19-115(f)(2) of the AGS Law, has a duty to adequately disclose the prices, terms, and conditions of its product. The evidence in this case demonstrates that the sales agents consistently misrepresented material facts about the product to consumers. Had the sales agents been truthful and accurate about the product, consumers might have understood that the Company's product, rather than an offer to provide gas service more cheaply, is intended to provide price stability against periods of increasing prices at the risk of paying more in periods of decreasing prices. (USESC Ex. 1.0, p. 4) Armed with that information, consumers could have made an informed decision. Instead, Staff's evidence in this proceeding regarding consumer complaints indicates that many consumers relied on claims of savings (ICC Staff Ex. 1.0, p. 6) when signing the contract and were surprised when they later examined their bills, in some cases months later when winter bills were issued (ICC Staff Ex. 2.0, p. 15). As shown in testimony, most consumers alleged a misrepresentation of the conditions of the contract and a false promise of savings. (CUB IB, p. 14; ICC Staff Ex. 1.0, p. 6; CG Ex. 1.0, p. 7) Even the Company admitted several instances of validly determined instances of misrepresentation on the part of its independent contractors. (Staff IB, p. 25; CG Ex. 3.6; USESC Ex. 5.0, p. 29)

B. Misrepresentation for Company Benefit

The Company suggests that it has never intended for customers to rely on any misrepresentation by its sales contractors because it does not derive any benefit. (USESC IB, p. 68) This argument holds no weight. As will be discussed further, during the Complaint Period, the Company derived many benefits from contracts entered into through misrepresentation and deception. First and foremost, some customers are intimidated by the high cancellation fees and remain with the Company even though they would have preferred to cancel. (ICC Staff Ex. 1.0, p. 6) The Company clearly derives profits from these customers throughout the contract term. (Tr. at 713-715 (Potter))

Second, the Company derives profits on consumer gas supplied before cancellation. As discussed above, many consumers do not realize that that they were deceived until they review their bills. Even if the consumer is permitted to terminate the contract without paying a termination fee, in these instances, the consumer is still required to pay the Company the cost of gas service at the Company's prices until the termination is effective. The Company derives a profit on this provision of gas, a clear benefit. (Id.)

Third, the Company derives profit from the imposition of high termination fees on consumers. All contracts during 2007 contained early termination fees allowing for the Company to charge 10 cents per therm times the customer's annual usage in therms for the remaining years left on the contract. (CG Ex. 1.0, p. 19) In its initial brief, the Company argues that its termination fee of 10 cents per therm ** [redacted] ** (USESC IB, pp. 75-76) So if a consumer terminates a contract due to misrepresentations and deceptions noticed after contract termination periods expire, the Company admits that it achieved, during the period from January 1, 2007 through February 4, 2008, at least 10 cents in profit per therm for each year remaining on the contract after cancellation. Even during the remainder of the Complaint Period, after the termination fee was changed in 2008 to

$75 per year for the remainder of the contract, a customer with a 5 year contract would look at a $375 termination fee and **[redacted]** (Id., p. 76[5]) From January 1, 2007 through December 1, 2008, the Company billed termination fees in the amount of **[redacted]** to Illinois customers, with Illinois residential customers being billed **[redacted]**. (CG Ex. 3.0C, p. 19) During the same time period, the Company collected termination fees in the amount of **[redacted]** from Illinois customers and **[redacted]** from Illinois residential customers. (Id.)

Fourth, the Company may profit from sales of cancelled gas to utilities. **[redacted]** The Company did not submit evidence as to its gas sales after customer cancellation. Consequently, there is no evidence in this

[5] Staff notes that the Company's initial brief argues under Count IV that the change to a $75 termination fee was made with the "full knowledge that its contractual losses would exceed $75 per year for each canceled contract." (USESC IB, p. 27) Not only does this statement appear to contradict other statements in the brief regarding the percentage of margin or profit reflected in the termination fees as liquidated damages (USESC IB, pp. 75-76; Tr. at 713-715 (Potter), which refers to the profit per therm), but it also appears to fail to consider the mitigating effect of subsequent sales of gas. One way in which Staff can reconcile these statements is if the referenced "contractual loss" means the loss of some of the anticipated profit or "margin." In Staff's view, referring to a reduction in anticipated profit as a "contractual loss," instead of simply referring to lost profits, while technically accurate, is exceedingly misleading.

proceeding that the Company loses money on the gas that returns to the Company after a cancellation. **[redacted]**

Finally, the Company derives profit from the imposition of fines and penalties on sales representatives determined to have misrepresented or deceived customers. The Company admits that it penalizes its independent agents for instances of misconduct by either a clawback of their commission or a monetary fine. While clawbacks are structured to take back the initial payment from the sales contractor, fines and other penalties constitutes profit to the Company. Even when the Company is forced to cancel a customer's contract without imposing exit fees, it collects fines from the independent agents who have committed instances of wrongdoing. Mr. Potter has further testified that the CCR Department is currently revising its penalty matrix to include stricter penalties, with a lot less discretion and subjectivity (Tr. at 701/8), thereby allowing the Company to increase profits from its sales agents' misrepresentations to potential customers. The Company now goes "straight to a monetary fine" (Tr. at 701/20 (Potter)) and "it's an increasing fine" (Tr. at 706/5 (Potter)) for disciplinary actions against its sales agents. (Tr. at 701/20 (Potter)) It is clear that the Company benefits from contracts executed because of misrepresentations and deception. Thus, the Company's argument that it does not intend for customers to rely on the misrepresentation by its agents because it does not benefit from such misrepresentations rings hollow in light of the manner in which it structures its business.

[redacted] If a customer relies on the misrepresentations made by the agent, he will sign a contract. During the Complaint Period, a customer would cancel and be subject to termination fees. If a customer complains and alleges a misrepresentation, then the Company can get money back from the agent and his respective crew coordinator and regional distributor through clawbacks and monetary fines.

C. <u>Knowledge and Notice of Misconduct and Failure To Remedy</u>

The Company attempts to argue that the isolated incidents with Mr. Zermeno's and Ms. Vargas' independent contractors should not infer that the Company tolerated misconduct. The Company argues that when it found out about the misconduct by these specific agents, it took steps to correct and remedy the situation by terminating the two agents and that this was sufficient action on its part to avoid liability. This argument is unsuccessful. First, as Staff has clearly shown, these incidents are not isolated but are repeating patterns of similar misrepresentations and deceptions that have plagued the Company for many years. (ICC Staff Ex. 1.0, p. 7) At the hearing, Company witness Potter testified that the previous settlement with CUB had similar allegations against the Company as contained in this Complaint and that the Company responded similarly by making changes to their contracts and written sales materials. (Tr. at 694-697). In its initial brief, Staff noted the similarities between the consumer allegations in this Complaint and other complaints lodged against the Company in other jurisdictions. (Staff IB, p. 7; Tr. at 694/12 (Potter)) Therefore, the Company cannot successfully argue that it had no idea that misrepresentations (of savings, termination fees, identity of salesperson as an employee of the utility or of a government agency, and the overall validity of the sale) were occurring or would not occur again. These types of complaints have been ongoing for years and the Company has had ample notice and an opportunity to cure these problems.

As indicated in Staff's initial brief, the Company itself identified trends of agent misconduct (Staff IB, p. 25; USESC Ex. 5.0, p. 29) and was therefore put on notice of the pervasiveness of the complaints. In addition to the complaints received by the Company itself, it received complaints from other third parties, including CUB, ICC, and BBB. Moreover, several formal complaints filed by independent complainants at the Commission also suggest the Company's prior knowledge or notice of the patterns of misconduct. In particular, in Docket No. 08-0589, the complainant alleged that the independent contractor forged her signature. One look at the exhibits attached to the Complaint will show that there is ample evidence that the contract in question was forged (see Attachments A, B, and C attached hereto). Even though this proceeding was eventually dismissed pursuant to a stipulation between the parties, the Company was again made aware that its agents were alleged to be forging signatures on contracts. As instances of alleged forgery increase, the Company's argument that Ms. Vargas' and Mr. Zermeno's agents were "rogue" falls apart very quickly. In CG Ex. 3.6, there are ** ** validly determined instances of disputed signature. This is clearly not evidence of "rogue" misconduct; instead, this is evidence of repeated, consistent, tolerated, and pervasive misconduct.

Second, the court cases have imposed liability when a company has received notice of similar occurrences and not prevented subsequent similar occurrences from happening. As discussed above, the Company has received ample notice regarding repeated patterns of similar allegations. The trends of consumer complaints give clear notice to the Company of the misrepresentations and deceptions that must be eliminated. This is not a situation where the Company has an unforeseen or rogue act of one or two sales representatives. Rather, the same misrepresentations and deceptions occur again and again and involve more than just a few bad actors, as the Company mistakenly alleges in its initial brief. (See generally CG Ex. 3.6)

Courts have distinguished isolated acts from repeated problems with employees or agents and have subjected companies to liability for the acts of their employees or agents that have been repeated.[6] Courts have held that prior accidents can be admitted into a personal injury action to show that there was knowledge on the defendant's part. In *Ray v. Cock Robin, Inc.*, 10 Ill.App.3d 276, 282 (1973), the Illinois Supreme Court held that "the evidence of prior accidents, occurring at the same place or with the same instrumentality, is competent, not for the purposes of showing independent acts of negligence, but for the limited purposes of showing that…frequency of such accidents tends to show knowledge of such condition." In *Lee v. Chicago Transit Authority*, 152 Ill.2d 432, 464 (1992), the Illinois Supreme Court also found that evidence of prior incidents was enough to establish notice and that there was no unfair prejudice to the defendants. In *Lee*, the court allowed evidence of incidents where

[6] The Company has not argued in this proceeding that it is immune from the acts of its independent contractors because of their status as independent contractors. Staff will not therefore spend a great deal of time refuting an argument that has not been made up to this point. Staff notes, however, that under the AGS Law, the Company is responsible for all of its obligations, whether it chooses to use employees to perform some of those obligations or whether it chooses to use independent contractors. From the perspective of the Commission, the Company is still obligated to comply with the AGS Law regardless of the means by which it chooses to do so. In addition, the Company can not avoid liability for the acts of its independent contractors unless each customer was made explicitly aware that the only recourse the customer had was against the sales person and not the Company. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill.2d 511, 522 (1993). The Company has made no such showing and Staff is not aware of any instance where such a disclosure was made. Consequently, the court cases regarding employees or agents of the Company give appropriate guidance to the Commission.

persons who came into contact with the third rail on the train tracks suffered serious injuries, which proved that the CTA should have known of the risk of injury. (Id. at 463-64). See also *Templeton v. Chicago & N.W. Transp. Co.*, 257 Ill.App.3d 42, 51 (1993) (evidence of prior falls off a bridge was admissible to show notice that bridges were not safe).

In addition, courts have been very clear in assigning liability to employers for employees engaging in sexual harassment when the employer knew of the harassment and did nothing to prevent future incidents from occurring, even if the employee is an independent contractor. In *Dunn v. Wash. County Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005), the Seventh Circuit Court of Appeals specifically stated:

> Because liability is direct rather than derivative, it makes no difference whether the person whose acts are complained of is an employee, an independent contractor, or for that matter a customer. Ability to “control” the actor plays no role. Employees are not puppets on strings; employers have an arsenal of incentives and sanctions (including discharge) that can be applied to affect conduct. It is the use (or failure to use) these options that makes an employer responsible--and in this respect independent contractors are no different from employees.

In *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798 (7th Cir. 2000), the Seventh Circuit also assigned liability to an employer for sexual harassment of its employee because it failed to take steps to stop it. “Recall that in the usual case of co-worker harassment, the employer becomes liable to the employee only when it knows or should know that wrongdoing is afoot and yet fails to take steps reasonably designed to stop it.” Id. at 811. The U.S. Supreme Court also recognized that conduct which is sufficiently pervasive and long continuing can infer knowledge or conscience on the employer’s part of sexual harassment occurring. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986). Also see *Taylor v. Jones*, 653 F.2d 1193, 1199 (1981) (“atmosphere of racial discrimination and of prejudice was so pervasive and so long continuing… that the employer must have become conscious of it"). Notice can even be based on complaints from someone else other than the victim. *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 783-84 (10th Cir. 1995).

D. Apparent Authority of Independent Contractors

The Company tries to distinguish vicarious liability from fault or non-compliance with a law and argues that vicarious liability does not make a principal a tortfeasor for an agent's tortious conduct. (USESC IB, p. 68-69) Staff simply disagrees with this argument. Under the Restatement (Second) of Agency §219(1) (1958), an employer is liable for: (1) any tort committed by an employee acting within the scope of his or her employment; (2) any tort committed by an employee in which the employer was negligent or reckless; or (3) any tort in which the employee purported to act or speak on behalf of the employer and there was reliance upon apparent authority, or the employee was aided in accomplishing the tort by the existence of the agency relation. *Hirschfeld v. New Mexico Corrections Dep't.*, 916 F.2d 572, 576 (10th Cir. 1990)

The Company's independent contractors have apparent authority given to them by the Company. This authority assigns liability to the Company for wrongdoing committed by the agents. As the Illinois Supreme Court has held:

> A principal will be bound not only by that authority which he will actually give to another, but also by the authority which he appears to give. Apparent authority in an agent is the authority which the principal knowingly permits the agent to assume, or the authority which the principal holds the agent out as possessing. It is the authority which a reasonably prudent person, exercising diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill.2d 511, 523 (1993).

Most importantly, apparent authority creates "tort liability where the injury would not have occurred **but for** the injured party's **justifiable reliance** on the apparent agency." Id. at 525. (emphasis added). In *Gilbert*, the Illinois Supreme Court held that the defendant hospital was liable for the acts of its independent contractor physician because the patient did not know the physician was an independent contractor. Id. at 525-26.

E. Double Recovery

The Company also tries to argue that no remedy is warranted under the CFA and the DTPA because the Complainants are seeking double recovery. It uses *Robinson v. Toyota Credit Corp.*, 201 Ill.2d 403 (2002), as its authority for this proposition. In *Robinson*, the Illinois Supreme Court did not allow the plaintiffs to recover under the Illinois state case since the plaintiffs had already recovered under a federal class action settlement in California for violations of the Consumer Leasing Act. Id. at 406. The plaintiffs had filed a subsequent complaint in Illinois alleging the same misconduct as violations of the Consumer Leasing Act and the Illinois Consumer Fraud Act. Id. at 410. These circumstances do not exist in this proceeding.

First of all, Staff believes that the Company has violated the AGS Law because its business practices indicate a failure to maintain sufficient managerial resources and abilities to serve its customers as required under Section 19-115(b)(2) of the PUA. The Company has done this by failing to manage its sales force, failing to properly track complaints, and failing to structure proper retention efforts. (Staff IB, pp. 4-18) Contrary to the Company's argument, some of the complaints identified by Staff and used to support its testimony differ from those complaints forming the basis of the CFA and DTPA violations. For example, the consumer complaints stating that it was difficult to cancel the service despite repeated attempts to do so (ICC Staff Ex. 1.0, p. 7) respond to the Company's consumer service department, not its sales force, and therefore, are not based upon the same conduct which supports the CFA and DTPA violations.

Second, Staff believes that the Company has not complied with the CFA and the DTPA because it has employed unfair and deceptive acts by misrepresenting material facts with intent that consumers rely on the misrepresentation and because it has engaged in deceptive trade practices in the course of its business. By not complyingwith the CFA and the DTPA, the Company is not complying with all applicable laws and rules as required under Section 19-110(e)(5) of the PUA. Even though these violations share some of the same set of facts (i.e., forgery, misrepresentations) in some instances, there is not just "one injury" (USESC IB, p. 70) as the Company argues. With respect to complaints against the Company's sales force, consumers were injured once when the Company failed to possess sufficient managerial resources and abilities and a second time when the Company failed to comply with all applicable laws and rules. In addition, the alternative gas supply market was injured when the Company failed to maintain the requisite managerial resources and abilities for certification. As such, there is more than one injury which justifies allowing more than one recovery.

In Staff's view, the Company has clearly committed deceptive practices against consumers during the Complaint Period. The Company had prior knowledge and notice of pervasive agent misconduct but failed to remedy and correct the situation; this evidence demonstrates that the Company intended that consumers rely on this deception. Moreover, the complaints of agent misconduct are pervasive enough that it is indisputable that the Company knew of them and yet failed to correct them. Not only were actual victims complaining to the Company, but the Company was receiving third party complaints from ICC Staff, CUB, and the BBB. In no way can the Company argue that it did not know about the severity and number of complaints of agent misconduct. Lastly, the agents were clearly acting with apparent authority of the Company and engaged in these violations of the CFA and the DTPA during the course of their employment, and consumers relied on this apparent authority when they entered into contracts with the sales agents who held themselves out as individuals with authority from USESC. As a result, Staff believes that the Company has violated the CFA in the 887 instances which the Company has admitted to and in the alternative, Staff believes that the Company has not complied with the CFA specifically with regard to Ms. Vargas and Mr. Zermeno. Furthermore, Staff believes that the Company has not complied with the DTPA in the 797 instances which the Company has admitted to and in the alternative, Staff believes that the Company has not complied with the DTPA specifically with regard to Ms. Vargas and Mr. Zermeno.

IV. Staff Recommendations

Staff makes the following recommendations for the Commission's consideration:

1. A finding of 3 violations of Section 19-110 and 19-115 of the PUA for violations or nonconformances with the managerial requirements of certification corresponding to the 3 managerial failures identified by Staff (or, alternatively, not to exceed $60,000 for the 6 violations or nonconformances related to failures to correct trends). In the alternative, a finding of 1 violation of Sections 19-110 and 19-115 of the PUA for a violation or nonconconformance with the managerial requirements of certification.

2. A finding of up to 887 violations of Section 19-110(e)(5) of the PUA for not complying with the CFA on 887 occasions. In the alternative, a finding of 2 violations of Section 19-110(e)(5) for not complying with the CFA with regard to Catherine Vargas and Alex Zermeno.

3. A finding of up to 797 violations of Section 19-110(e)(5) of the PUA for not complying with the DTPA on 797 occasions. In the alternative, a finding of 2 violations of Section 19-110(e)(5) for not complying with the DTPA with regard to Catherine Vargas and Alex Zermeno.

4. An imposition of financial penalties not to exceed $30,000 for the 3 violations or nonconformances with Sections 19-110 and 19-115 of the managerial requirements of certification (or, alternatively, not to exceed $60,000 for the 6 violations or nonconformances related to failures to correct trends). In the alternative, an imposition of financial penalties not to exceed $10,000 for the 1 violation or nonconformance with Sections 19-110 and 19-115 of the managerial requirements of certification.

Even if the Commission should not order any of the above recommendations, at a minimum, Staff recommends that the Commission order the Company to supplement its managerial resources and abilities by implementing the following permanent changes:

1. The third party verification has to be performed without the presence of the salesperson. The questions from the verification agent to the customer should be asked separately with pauses for an answer for each question instead of in one affirmation. Staff recommends that the Company changes its third party verification scripts to adopt these changes and Staff would like to receive copies of these scripts.

2. The management present in Illinois must effectively monitor and check the conversations of sales agents with recent allegations of misconduct.

3. Customer requests for service cancellations must be forwarded to the utility for cancellation within 2 business days of the Company receiving the request from the customer, and without any barriers beyond normal legal retention efforts. Cancellations should be done at the customer service level, not escalated or referred to some other department, such as CCR.

4. Proper tracking and escalations of complaints received directly from customers (this does not include complaints from third parties). This requires that CCR be notified of every situation or complaint alleging agent misconduct.

5. Such other changes that the Company has implemented voluntarily or otherwise believes will address the violations or nonconformances found by the Commission.

V. Conclusion

WHEREFORE, for all of the following reasons, Staff respectfully requests that the Commission's order in this proceeding reflect all of Staff's recommendations.

December 17, 2009

Respectfully submitted,

/s/____________________

NORA NAUGHTON
JENNIFER LIN
Staff Counsel

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Illinois Commerce Commission
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Chicago, IL 60601
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jlin@icc.illinois.gov

Docket No. 08-0175
Staff Reply Brief
Attachment A

For Commission Use Only:
Case: 08-0689

OFFICIAL FILE
ILLINOIS COMMERCE COMMISSION

FORMAL COMPLAINT

Illinois Commerce Commission
527 E. Capitol Avenue
Springfield, Illinois 62701

ORIGINAL

Regarding a complaint by (Person making the complaint): David and Mary Oliputon

Against (Utility name): Illinois Energy Savings Corp. d/b/a U.S. Energy Savings Corp.

As to (Reason for complaint) A representative did a door knock solicitation at complaintant's residence. Husband David was not at home and was needed to provide authorization prior to any service change. Representative Blount then completed an unauthorized service change

in Chicago Illinois.

2008 OCT 2 P 3 3

TO THE ILLINOIS COMMERCE COMMISSION, SPRINGFIELD, ILLINOIS:

My mailing address is 9226 S. Parnell, Chicago, IL 60620.

The service address that I am complaining about is 9226 S. Parnell, Chicago, IL 60620.

My home telephone is (773) 651-9692

Between 8:30 A.M. and 5:00 P.M. weekdays, I can be reached at (773) 651-9692

My e-mail address is not applicable

I will accept documents by electronic means (e-mail) ☐ Yes ☑ No

(Full name of utility company) Illinois Energy Savings Corp. (respondent) is a public utility and is subject to the provisions of the Illinois Public Utilities Act.

In the space below, list the specific section of the law, Commission rule(s), or utility tariffs that you think is involved with your complaint.

815 ILCS 505 - Consumer Fraud & Deceptive Business Practices
220 ILCS 5/10-108 - Slamming

Have you contacted the Consumer Services Division of the Illinois Commerce Commission about your complaint? ☑ Yes ☐ No

Has your complaint filed with that office been closed? ☑ Yes ☐ No

Please state your complaint briefly. Number each of the paragraphs. Please include time period and dollar amounts involved with your complaint. Use an extra sheet of paper if needed.

please see attached "Statement of Complaint" and twelve (12) supporting exihibits.

Please clearly state what you want the Commission to do in this case:

To refund additional monies paid to U.S. Energy Savings Corp by Complaintants as result of illegal practices.

NOTICE: *If personal information* (such as a social security number or a bank account number) is contained in this complaint form or provided later in this proceeding, you should submit both a public copy and a confidential copy of the document. Any personal information contained in the public copy should be obscured or removed from the document prior to its submission to the Chief Clerk's office. Any personal information contained in the confidential copy should remain legible. If personal information is provided in your public copy, be advised that it will be available on the internet through the Commission's e-Docket website. The confidential copy of any filing you make, however, will only be available to Commission employees. If you file both a public and confidential version of a document, clearly mark them as such.

Today's Date: October 17, 2008 (Month, day, year) Complainant's Signature: x Mary Olupitan

If an attorney will represent you, please give the attorney's name, address, telephone number, and e-mail address.

When you finish filling out this complaint form, you need to file the original with the Commission's Chief Clerk. When filing the original complaint, be sure to *include one copy of the original complaint for each utility company complained about* (referred to as respondents).

VERIFICATION

A notary public must witness the completion of this part of the form.

x David Olupitan

I, x Mary Olupitan, Complainant, first being duly sworn, say that I have read the above petition and know what it says. The contents of this petition are true to the best of my knowledge.

x

x Mary Olupitan

Complainant's Signature

"OFFICIAL SEAL"
Rosie M. Lloyd
Notary Public, State of Illinois
My Commission Exp. 02/05/2009

Subscribed and sworn/affirmed to before me on (month, day, year) 10-17-2008

Rosie M Lloyd

Signature, Notary Public, Illinois

(NOTARY SEAL)

NOTE: Failure to answer all of the questions on this form may result in this form being returned without processing.

I

U.S. ENERGY SAVINGS

8600 West Bryn Mawr, Suite 440N
Chicago, Illinois, 60631
Tel: 1.888.674.7847 Fax: 1.888.548.7690
Email: cs@energysavings.com

May 9, 2008

David & Mary Olupitan
9226 S. Parnell Ave.
Chicago, IL
60620-2333

Re: Account Number 8500012961066

Dear David & Mary Olupitan:

Enclosed as per your request, please find a photocopy of the contract with terms and conditions for the natural gas price protection program.

Should you have any questions regarding U.S. Energy Savings Corp. (USESC), please feel free to contact one of our knowledgeable customer service representatives toll-free at 1-888-674-7847.

Sincerely,

Colleen Bryan
Customer Relations

10277650

Natural Gas Fixed Price Program Agreement (Terms and Conditions, Notice of Appointment of Agent, and Appointment of Agent)

Agreement between: Customer and U.S. Energy Savings Corp. ("USESC")

Notice to: Customer's local gas utility (Northern Illinois Gas Company d/b/a Nicor Gas or Peoples Energy Corporation d/b/a Peoples Gas and North Shore Gas, as applicable (each, the "Utility"))

1. Agreement and Authority. If the Agreement is signed by a signatory who is not Customer, the signatory confirms that he/she has the authority to enter into on behalf of, and to bind, Customer to the Agreement. Customer has read, understands and agrees to the Agreement. Customer authorizes USESC to enter into, amend or terminate agreements with Utility and other third parties relating to the supply, volume load balancing, transportation, delivery, purchasing, and billing of natural gas on Customer's behalf as though Customer had entered into the agreements. Utility may rely upon anything done, or any document signed, by USESC relating to the supply, volume load balancing, transportation, delivery, purchasing and billing of natural gas as though Customer had performed the action or signed the document. Customer directs Utility to release all information related to Customer's present arrangements for the supply, delivery, and billing of natural gas to USESC. The Agreement is not valid for existing USESC customers.

2. Effectiveness. The Agreement is effective four business days after being signed by, or on behalf of, Customer and is conditioned upon the Independent Contractor submitting the Agreement to USESC and approval by Utility and USESC. USESC approval is at its sole and unfettered discretion. USESC may require satisfactory credit information (lack of credit information may result in the Agreement not being approved) and verification of information through recorded telephone call in order to approve the Agreement. If USESC does not commence supply within 120 days of Customer entering into the Agreement, Customer agrees that the Agreement is deemed terminated with no cost or penalty to either party.

3. Credit. Customer (and signatory, if signatory is noted as Customer's spouse) agrees to USESC obtaining a credit report and investigating Customer's (and, if applicable, signatory's) credit rating, credit history and Utility bill payment status and history. USESC will send a letter by regular mail to Customer's billing address if Customer is not approved by USESC for credit reasons.

4. Information. Customer shall notify USESC in writing of any change in Customer information within 30 days prior to the change occurring. Utility may also advise USESC of any such change. The Agreement applies to any address that replaces the service address (e.g., if Customer moves), if possible, at the sole discretion of USESC. Customer agrees that if a natural gas distributor other than Utility services the new address (the "Subsequent Utility"), the changes to the Agreement necessary to reflect the applicability of the Agreement to the Subsequent Utility are deemed incorporated herein. Customer agrees that the Agreement will constitute a notice of appointment of agency to the Subsequent Utility. Should the charges associated with the Subsequent Utility be greater than those applicable to Customer's original address, and should Customer object to paying the greater charges associated with the replacement address, USESC shall have the option to continue the Agreement under the terms and conditions applicable to the original address or terminate the Agreement without damages to either party. Customer understands that failure to advise USESC of a change in information may result in termination fees being applied (see para. 10). Customer agrees that incorrect information may be rectified or deemed rectified. Customer authorizes USESC to receive and disclose account-related information to relevant third parties (e.g., suppliers, credit agencies, purchasers, and service providers). Customer consents to the recording of calls between Customer and USESC and to the maintenance of documents for such time as is appropriate or required.

5. Term. The term of the Agreement (the "Term") is 4 or 5 years, as selected on the Agreement (if no selection is made, the Term is deemed to be 5 years). The Term commences on the date of first gas supply under the Agreement (or, if Customer unilaterally cancels the Agreement before gas supply starts, USESC's anticipated date of first gas supply), which will be approximately 15-90 days after signing, and ends at the time of the estimated or actual meter reading performed at the end of the initial period of 4 or 5 years.

6. Price. Customer agrees to pay the Price set out on the Agreement for the gas supply portion of Utility bill during the Term. The Agreement does not cover delivery and other Utility charges (Customer remains obligated to pay Utility for Utility's charges). Customer understands that Utility's natural gas commodity price over the Term may or may not be greater than the Price. The Price does not include, and Customer also agrees to pay: in the case of Peoples Gas and North Shore Gas service territories, the Pass-through Charge ("PTC") and, in the case of Nicor Gas service territory, the Customer Select Charge ("CSC"); applicable taxes; and interest on late payments from the due date until paid, at the lesser of the maximum lawful rate of interest or 1.5%/month. The PTC and CSC may vary and are not in the control of USESC. The PTC is comprised of an aggregation balancing gas charge and a storage service cost recovery charge. The CSC recovers the costs associated with the daily balancing of gas supplies. Customer will be billed by Utility for all of the above-mentioned amounts, in accordance with Customer's billing arrangements with Utility. If Customer opts out of the budget billing plan ("Budget Billing"), Customer will be billed the Price and the PTC or CSC, as applicable, based on actual or estimated consumption during each billing period.

7. Budget Billing. Unless Customer opts out, Customer will be billed the Budget Billing amount, which shall represent the Price and PTC (if applicable) multiplied by Customer's historical annual natural gas usage in therms (or an estimate thereof), plus any outstanding balance owed to USESC, all divided by Customer's annual number of bills (usually twelve). The Budget Billing amount will be set out in a letter to Customer, will be re-evaluated periodically, and may be adjusted up or down depending on Customer's consumption. At the end of Customer's Budget Billing year, any underpayment or overpayment beyond a specified amount must be settled. Any overpayment or underpayment that is less than the specified amount will be added to or subtracted from the following period's calculation of the Budget Billing amount. Customer may elect to leave Budget Billing at any time. Should Customer leave Budget Billing, Customer and USESC agree to settle any overpayment or underpayment on the next available bill (allowing for reasonable processing time for USESC). If Customer fails to pay the Budget Billing amount when due, Customer may be removed from Budget Billing (temporarily or permanently, at USESC's discretion) and required to pay: (a) immediately, any amounts that, but for Budget Billing, would have been owed for actual consumption; and (b) on all future bills, the amounts set out in para. 6, in accordance with actual or estimated usage for each billing period.

U.S. ENERGY SAVINGS

U.S. ENERGY SAVINGS CORP.
NATURAL GAS FIXED PRICE PROGRAM AGI 10277650

President's Plaza, 8600 West Bryn Mawr, Suite 440N Chicago, Illinois, 60631
1.888.674.7847 1.888.548.7690 www.energysavings.com cs@energysavings.com

The account holder noted below (the "Customer") hereby appoints Illinois Energy Savings Corp., doing business as U.S. Energy Savings Corp. ("USESC), as Customer's sole and exclusive agent and supplier for natural gas commodity for the location(s) associated with the account number(s) listed below and on any attached schedule.

Customer: (a) has read the Agreement (which includes the attached terms and conditions); (b) understands and agrees to be bound by the Agreement; and (c) has received a copy of the Agreement and the attached notice of cancellation with necessary elements completed.

Customer is responsible for ensuring the accuracy of the information set out below. Ram 12730

~~Robert 13022~~

Residential Customers

● **Spouse**
○ **Account Holder**

For credit verification purposes:
Social Security Number of Customer

Date of birth of Customer
11 26 1936
Month Day Year

If the signatory is Customer's spouse, the signatory confirms that she/he has the authority to authorize USESC to perform a credit check on Customer and that the signatory will use the natural gas supplied and be jointly and severally liable for payment under the Agreement.

Business Customers

○ **Sole Proprietorship**

For credit verification purposes:
Business Tax ID Number (or SSN)

Date of birth of Owner
Month Day Year

○ **Partnership**
○ **Corporation**
Business Tax ID Number

David Olupitan
Customer Name (account holder (if a business, record the proper legal name))

Mary Olupitan
Contact Name (if different from above)

9226 S. Parnell Ave. Chgo 60620
Billing Address City Zip Code

Service Address (if different from above) City Zip Code

(773)651-9692
Daytime Telephone # Ext. Evening Telephone #

E-mail address Fax No.

● Peoples Gas Account No. ○ North Shore Gas Account No. ○ Nicor Gas Account No.
8-5000-1296-1066 OR

Local Gas Meter No.
P116726120

Customer will automatically be enrolled in USESC's Budget Billing plan (see para. 7). If Customer wishes to opt out of the Budget Billing plan, check here ●.

Key Information Summary: Please read carefully

- Customer acknowledges that the independent contractor was wearing a USESC photo ID badge, identified himself/herself clearly as representing USESC and advised that the Agreement is with USESC, an independent natural gas supplier, not the Utility (Nicor Gas, Peoples Gas or North Shore Gas). MO (Customer Initials)
- If Customer breaches or terminates the Agreement, the cost is 10¢ per therm times remaining usage (see para. 10). (For an average residential customer (1,000 therms per year), this would be $100 for each remaining year of the Term). MO (Customer Initials)
- Customer chooses the initial period of the Agreement to be: ○ 4 years or ● 5 years.

Customer agrees to purchase natural gas commodity supply at a fixed price of $1.14 per therm (the "Price"). In the case of Peoples Gas and North Shore Gas service territories, Customer also agrees to pay the Pass-through Charge (currently about 4.4¢ per therm in Peoples Gas service territory and 7.2¢ per therm in North Shore Gas service territory). In the case of Nicor Gas service territory, Customer also agrees to pay the Customer Select Charge. Customer understands that this Agreement does not cover delivery and other Utility charges.

Customer's Right to Cancel: You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right. For you to cancel your Agreement within three business days of signing, call or write to: Customer Service, USESC, President's Plaza, 8600 West Bryn Mawr, Suite 440N, Chicago, Illinois, 60631, tel. 1.888.674.7847, fax 1.888.548.7690.

Mary Olupitan I have the authority to bind Customer.
Signature Title of Signatory (for businesses) 05 25 2007
Month Day Year

~~David Olupitan~~ Mary Olupitan
Print Name

Shikita Blount Shikita Blount
Independent Contractor Name Independent Contractor Signature Independent Contractor Number

FPRC Source Code
291953571 51 760459

USESC.NI.19

8. Renewal. USESC MAY RENEW THE AGREEMENT FOR SUCCESSIVE TERMS UPON NOTICE TO CUSTOMER OF THE AMENDED TERMS AND CONDITIONS OF SUCH RENEWAL, INCLUDING CHANGES TO PRICE AND TERM. CUSTOMER HAS 30 DAYS FROM THE DATE THE NOTICE WAS SENT TO ELECT AGAINST RENEWAL, IN WRITING, AFTER WHICH TIME THE AGREEMENT WILL AUTOMATICALLY RENEW UNDER THE CONDITIONS SET OUT IN THE RENEWAL NOTICE. THE PARTIES AGREE THAT ANY PROVISIONS REQUIRED BY LAW TO BE CONTAINED HEREIN ARE DEEMED INCORPORATED HEREIN. AT THE TIME OF PRINTING, THE AUTOMATIC CONTRACT RENEWAL ACT PROVIDED FOR RENEWAL NOTICES TO CERTAIN CUSTOMERS TO BE SENT NO EARLIER THAN 60 DAYS BEFORE THE CANCELLATION DEADLINE, AND USESC WILL ABIDE BY THIS PROVISION OR SUCH OTHER PROVISION AS MAY BE IN FORCE AT THE TIME OF RENEWAL.

9. Changes. USESC may change the terms and conditions of the Agreement (other than Price and Term) during the Term upon notice to Customer, and Customer has 30 days from the date the notice was sent to elect against such changed terms and conditions. Customer cannot elect against a change to billing arrangements.

10. Termination. USESC enters into fixed term gas supply arrangements to meet the requirements of each user such as Customer. If Customer terminates or breaches the Agreement after it has come into effect (whether or not gas supply has commenced), including by failing to pay the amounts required, switching suppliers, reverting to supply from another source (such as Utility), or failing to notify USESC of a change in information, USESC may terminate the Agreement and charge Customer damages. Customer agrees to pay those damages as liquidated damages calculated as follows: 10 cents/therm times the remaining years, or part thereof, of the Term times Customer's annual gas usage in therms. For an average residential customer, the liquidated damages would be $100 for each remaining year of Term. Customer agrees to these liquidated damages because Customer agrees that the actual damages incurred by USESC would be difficult to determine under the circumstances and the amount of these liquidated damages is reasonable under the circumstances and is not a penalty. Customer also agrees to pay to USESC any fees (including legal fees) associated with the collection of liquidated damages and authorizes and directs Utility to include the liquidated damages and any collection fees in Customer's utility bill as an amount payable to USESC. USESC may cease supply, temporarily or permanently, to Customer, upon Customer's breach (including failure to pay amounts owed on time). This is in addition to USESC's right to damages and shall not entitle Customer to damages.

11. Miscellaneous. The Agreement is the entire agreement between the parties. No handwritten alterations to these terms and conditions or the Price are valid or binding. Customer agrees that Customer did not rely on any oral representations other than such as are also reflected in writing here. To the extent that any part of the Agreement is deemed unenforceable, then that part shall be replaced by an enforceable provision as close as possible in meaning to the original, and all other parts of the Agreement shall remain in full force and effect. Customer agrees that USESC is not responsible for any damages that may be suffered by Customer except in the case of intentional wrongdoing by USESC itself. Customer indemnifies Utility from any claim in respect of obligations of USESC. USESC may, with or without notice to, or consent from, Customer, sell, assign, transfer or grant a security interest in all or any part of its interest in the Agreement, or any amounts payable hereunder. The Agreement cannot be assigned by Customer, except with the express written permission of USESC. If USESC does not comply with its obligation to supply natural gas, USESC will offer to reimburse Customer for the additional cost, if any, incurred to acquire the natural gas that was required to be provided under the Agreement. The Agreement and any renewal or amendment shall be determined in accordance with the laws of the State of Illinois. If Customer has any questions or complaints, Customer may contact USESC at the numbers below or the Illinois Commerce Commission at 1.800.524.0795.

IN CASE OF SMELL OF GAS OR OTHER INDICATION THAT THERE MAY BE A GAS LEAK, CUSTOMER SHALL CALL THE LOCAL UTILITY: NICOR GAS (1.888.642.6748) OR PEOPLES GAS (1.866.556.6002) OR NORTH SHORE GAS (1.866.556.6005). IN NO EVENT SHALL USESC BE LIABLE FOR ANY ACTS OF INDEPENDENT CONTRACTORS OR SERVICE PROVIDERS. IN NO EVENT SHALL USESC BE LIABLE FOR ANY DAMAGE DIRECTLY OR INDIRECTLY CAUSED BY A GAS LEAK. NEITHER CUSTOMER NOR USESC SHALL BE LIABLE TO THE OTHER FOR ANY SPECIAL, INDIRECT, CONSEQUENTIAL OR PUNITIVE DAMAGES ARISING UNDER CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY OR OTHER LEGAL THEORY. USESC SHALL NOT BE LIABLE IN CASE OF A FORCE MAJEURE EVENT OR 'ACT OF GOD'. IF USESC'S DIRECT OR INDIRECT SUPPLIERS DECLARE A FORCE MAJEURE EVENT OR 'ACT OF GOD' THAT AFFECTS USESC'S ABILITY TO SUPPLY NATURAL GAS AT THE PRICE, CUSTOMER AGREES TO PAY FOR NATURAL GAS SUPPLIED AT THE MARKET PRICE AVAILABLE TO USESC FOR THE DURATION OF THE DECLARATION OF THE FORCE MAJEURE EVENT OR 'ACT OF GOD'.

U.S. Energy Savings Corp. by its Executive Chair

Toll Free Tel. 1.888.674.7847
Toll Free Fax 1.888.548.7690
E-mail: cs@energysavings.com OR
Mail: President's Plaza, 8600 West Bryn Mawr, Suite 440N Chicago, Illinois 60631

K

[redacted] July 15, 2008
Pay to the order of [illegible] $171.00
One Hundred seventy one Dollars
[redacted]
Mary Olugitan
[redacted]

7/30/2008 [redacted] $171.00

[redacted] Aug 1, 2008
Pay to the order of G.M.A.C. $767.86
[illegible] Hundred sixty [illegible] 86/100 Dollars
[redacted]
Mary Olugitan
[redacted]

8/4/2008 [redacted] $767.86

[redacted] Aug 1, 2008
Pay to the order of Sam's Club $250.00
Two Hundred fifty [illegible] Dollars
[redacted]
Mary Olugitan
[redacted]

8/5/2008 [redacted] $250.00

[redacted] Aug 8, 2008
Pay to the order of K Mart $145.05
One Hundred forty five & 05/100 Dollars
[redacted]
Mary Olugitan
[redacted]

8/11/2008 [redacted] $145.05

[redacted] August 1, 2008
Pay to the order of Com Ed $135.00
One Hundred thirty five Dollars
[redacted]
Mary Olugitan
[redacted]

8/5/2008 [redacted] $135.00

[redacted] Aug 1, 2008
Pay to the order of United Credit Union $220.00
Two Hundred twenty [illegible] Dollars
[redacted]
Mary Olugitan
[redacted]

8/6/2008 [redacted] $220.00

[redacted] Aug 1, 2008
Pay to the order of Sam's Club $121.60
One Hundred twenty one & 60/100 Dollars
[redacted]
Memo purchase
Mary Olugitan
[redacted]

8/5/2008 [redacted] $121.60

[redacted] Aug 11, 2008
Pay to the order of [illegible] $10.95
[illegible] 95/100 Dollars
Lakeside Bank
Mary Olugitan
[redacted]

8/15/2008 [redacted] $10.95