

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

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

**REPLY BRIEF OF
CITIZENS UTILITY BOARD AND AARP**

PUBLIC

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ARGUMENT.....7

 A. Consumers are Misinformed About USESC’s Product,
 Which is Better Characterized as “Expensive” than “Unique”..... 7

 B. USESC’s Training has Proven Inconsequential to Sales Agent
 Misconduct..... 13

 C. The Lack of Management Oversight is Pervasive and Representative
 of USESC’s Corporate Culture..... 14

 D. The Volume and Nature of Complaints Regarding Sales Agent
 Misconduct and its Cancellation Rate Should have Served as a
 Red Flag to the Company..... 15

 E. CCR’s Investigation Process is not Effective in Rooting Out
 Sales Agent Misconduct..... 20

 F. The Company’s Remedial Measures do not Address the Key
 Problem on the Porch as Evidenced by USESC’s Persistently
 High Complaint Rate..... 23

 G. USESC’s Liquidated Damages Clause Unreasonably High
 and has Resulted in Tidy Profits for the Company..... 24

 H. CFA & DTPA Violations..... 25

 I. USESC’s Own Documents Demonstrate that it Markets
 Heavily in Low-Income and Low-Credit Areas..... 29

III. REMEDIES..... 32

IV. CONCLUSION.....35

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NOW COMES the Citizens Utility Board (“CUB”) and AARP, (“CUB/AARP”), through their counsel, pursuant to 83 Illinois Administrative Code Sections 200.800 and the schedule adopted by the Administrative Law Judge (“ALJ”), hereby submit their Reply Brief in the above-captioned proceeding. CUB/AARP responds to Illinois Energy Savings Corp., d/b/a U.S. Energy Savings Corp.’s, (“USESC” or the “Company”) claim that it has always been in compliance with Illinois law and should receive no consequences, with uncontroverted evidence demonstrating the contrary and supporting CUB/AARP’s requested relief.

I. INTRODUCTION

In USESC’s view of the world, the Illinois Commerce Commission (“Commission” or “ICC”) should ignore thousands of consumer complaints from CUB and the Commission regarding USESC’s misleading marketing, because consumers are either lying or just don’t get

it. USESC would have the Commission believe that consumer complaints regarding sales agents' misrepresenting themselves or the product they sell are a result of either 1) savvy consumers carefully watching the wholesale gas market and the utility Purchased Gas Adjustment ("PGA") rate, capitalizing on high market prices by entering into a USESC fixed price contract just at the right moment, but then lying to get out of the contract when market prices and the PGA rate fall; and/or 2) the Commission is failing to do its job to educate consumers on customer choice, so consumers just do not have the familiarity with gas choice to sufficiently understand USESC's product. USESC would also have the Commission believe that it has no responsibility for sales agents who may "go rogue" and ignore Company policy. By USESC's standard, the only way this Commission could find a violation of the Public Utilities Act ("PUA") requirements under the Alternative Gas Supplier Law ("AGSL") is to have each and every one of the thousands of complainants testify or provide an affidavit attesting that alleged fraudulent activity actually occurred. USESC Init. Br. at 13. The AGSL simply cannot be interpreted to foster such a result, or the Commission's authority under the PUA would be eviscerated. Nor does the law support such an interpretation of the facts.

First, despite its desperate wish otherwise, the Company is, in fact, liable for the actions of its agents, whether they are following prescribed Company policy or not, because the evidence clearly shows the Company turning a blind eye to sales agent misconduct. In fact, according to the Company, even its own admitted instance of slamming was not its fault, because the sales contractor involved "acted outside the scope of [his] authority and in direct violation of Company policy." USESC Init. Br. at 13. This ignores the long-standing legal construct that makes the principal legally liable for actions of its agent. *Hoffman & Morton Co. v. American Ins. Co.*, 35 Ill. App. 2d 97, 102 (1962).

Second, the evidence in this proceeding cannot be excused away as actions of one-off rogue contractors ignoring Company policy. The evidence demonstrates that sales agent misconduct is an endemic problem that has persisted for years. USESC attempts to defend itself based on the premise that complaints from CUB and the ICC are unreliable and even “self-serving.” Apparently, USESC believes CUB is out to get them,¹ going so far as to claim that “CUB made specific efforts to increase the numbers against Illinois Energy,” and that our “strategy” in this case is “fundamentally unfair.” USESC Init. Br. at 19.

In its continuing attempts to downplay the seriousness of the allegations in this proceeding, USESC would like the Commission to believe that CUB created this problem out of whole cloth by its “active solicitation,” as the Company describes it, of consumer grievances. *Id.* In fact, CUB’s communications with consumers about USESC came in response to the huge volume and egregious nature of the complaints the organization had already received about the Company. Through these communications, CUB was able to inform and assist numerous customers who otherwise would have no knowledge of their rights or ability to get out of their USESC contracts. As the Company’s own data shows, certain customer complaints, including those referred by a third party, such as CUB, get preferential treatment when trying to get out of their contracts. CG Ex. 1.0 at 32-35, LL. 663-708

Yet, the Commission need not rely on evidence of misconduct from CUB, the People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois (the “AG”), the Better Business Bureau (“BBB”) or even its own Staff. The Commission need only to look at the Company’s own evidence of thousands of allegations found to be valid – allegations of sales agent misrepresentation and slamming; evidence that its sales agents ignore and/or violate the

¹ USESC does not mention complaints from AARP, Commission Staff, the Attorney General and the Better Business Bureau as “self serving.” It reserves that honor for CUB.

Company's Code of Conduct and the law. The Commission should ignore USESC's desperate attempt to sweep this evidence under the rug.

Third, USESC's declaration that its management structure is sufficient to appropriately manage its sales contractors and serve its customers rings hollow when, in reality, sales agents are largely left to their own devices. Until very recently, the Company's expressed policy was *not* to perform field evaluations of sales contractors. Only now does the Company have a single, salaried, non-commission-based employee, whose job it is to supervise sales agent compliance with the Code of Conduct and the law, working in the Chicago area. Nor do the Regional Managers constitute a "managerial presence," since both Mr. Hames and Mr. Nicholson testified that they do not accompany sales contractors in the field and do not have the authority to issue consequences against sales agents for violations of the Code. Tr. at 93/11 (Hames); Tr. at 98/19-20 (Hames); Tr. at 203/15 (Nicholson).

In fact, none of the duties outlined in the Regional Distributor's contract includes management oversight of the sales agents, assuring compliance with the Code of Conduct, reporting violations or misconduct, conducting field visits to assure compliance, or taking any independent actions to assure compliance with Illinois law or its license conditions. CG Ex. 3.0 at 8, LL. 156-61. While the Company relies on the Regional Distributors to ensure that all sales activities are compliant with the law, that duty is not even in their job description. And, as demonstrated in CUB/AARP's Initial Brief, visits from the Ontario corporate office went largely undocumented and thus there is no evidence that these visits entailed any substantive or effective managerial presence or oversight of sales activity on the ground. CUB/AARP Init. Br. at 23.

Mr. Potter explained that door-to-door sales are inherently more complaint-provoking than telemarketing or other types of print or media advertising. Tr. at 735/6 (Potter). In fact, the

Company attempts to use its preferred sales method as an excuse for the high level of complaints. Yet, USESC chose this sales method and has built its entire business around it. Tr. at 414/5 (Potter). There are more than 12 different alternative gas suppliers operating in Illinois, (CUB Ex. 5.0 at 3, L. 59) presumably at a profit, yet USESC is the only one that conducts sales almost exclusively through door-to-door marketing. The Company could have chosen a business model less prone to abuse—and therefore complaints—but it did not. The Commission should reject USESC’s attempts to blame its problems on the very business model the Company itself has chosen.

As Ms. Alexander explained, USESC management has set up a structure where all management resides in Ontario, Canada. While such an organizational structure is not defective on its face, “in order for it to work, the managers located in Ontario, Canada must have the policies, procedures, and management oversight functions in place and those policies, procedures and oversight functions must actually be implemented.” CG Ex. 3.0 at 9, LL. 179-81. Considering the Company only disciplined a total of 15 of the 268 sales agents with *thousands* of complaints of misrepresentation and other fraudulent sales tactics against them, (CG Ex. 3.0 at 24-25, LL. 484-98), it is clear the corporate office is not enforcing its own policies, procedures and Code of Conduct in any material way.

Because door-to-door sales is such a “hands on sales technique,” Mr. Agnew testified that “it’s my opinion that you need to have more of a hands on managerial aspect in order to try to keep [marketing abuses] from happening.” Tr. at 956/12 (Agnew). When asked by the ALJ to suggest mechanisms to minimize misleading representations in during door-to-door sales presentations, Mr. Agnew testified that USESC needs “to be more aware of what’s going on on the porches.” Tr. at 959/1 (Agnew). As stated above, the one compliance manager in Illinois,

hired to comply with the AG Settlement, is responsible for managing and monitoring compliance efforts in each sales office, and conducting field shadowing of sales agents. Tr. at 762/14 (Potter). The problem is, this *one* person must supervise 130 sales agents. Considering that Mr. Hames testified about having trouble managing more than 10 sales agents at once, this one compliance manager “may have some trouble” overseeing USESC’s entire sales force single-handedly. See Tr. at 951/10 (Agnew).

USESC denied throughout this proceeding that it tracked customer complaints in any systematic way, only to dump thousands of pages from a complaint-tracking database on the parties at the 11th hour of this proceeding. See CUB/AARP Init. Br. at 3. This clearly demonstrates the Company’s “hide the ball” attitude to this litigation, as well as disrespect for the parties to this proceeding and the Commission’s authority. It is also representative of the Company’s defensive and reactionary approach to accusations of wrong-doing. Ms. Alexander concluded that

USESC undertook changes in response to litigation, the threat of litigation, and the fear of public exposure to adverse publicity. These motivations are not those of a business that has built into its daily operations the means to prevent fraud, misrepresentation, slamming, and high-pressure sales conduct by its sales agents, activities that obviously reflect an economic desire to earn commissions for selling USESC’s contracts.

CG Ex. 3.0 at 12-13, LL. 244-249.

Yet, USESC maintained throughout this case that it has, at all times, remained in compliance with the law. USESC Init. Br. at 1. The fact that USESC is satisfied with its current approach to management and supervision of its sales force should set off alarm bells for the Commission. At this juncture, with multiple law suits and a record replete with evidence regarding the Company’s knowledge of and tolerance for thousands allegations of agent

misconduct, the Commission cannot trust USESC to make the necessary reforms on its own accord.

Any changes to its marketing materials, contract or verification procedures do not adequately address the problems outlined by CUB/AARP and Staff of the Illinois Commerce Commission (“Commission Staff” or “Staff”) regarding the overwhelming influence of the sales contractor on the porch. Moreover, USESC “did nothing to fix these problems until those matters came to them in this degree of formality.” Tr. at 667/14 (Alexander). The Commission must exercise its authority and revoke USESC’s Certificate of Convenience in order to stop intolerable marketing abuses until the Company has demonstrated sufficient managerial fitness to operate its business pursuant to Illinois law.

II. ARGUMENT

A. CONSUMERS ARE MISINFORMED ABOUT USESC’S PRODUCT, WHICH IS BETTER CHARACTERIZED AS “EXPENSIVE” THAN “UNIQUE”

USESC claims that customers choose its “unique” four- and five-year fixed price contracts for the “economic benefit” associated with long-term price stability, whether the customer saves money or pays significantly in excess of the utility rate. USESC Init. Br. at 1, 40. Mr. Potter considers a customer paying substantially more than they otherwise would have paid the utility as having received an “economic benefit” from USESC’s product, simply by virtue of paying the same amount each month. Tr. at 544/1 (Potter). The only thing “unique” about USESC’s long-term fixed-priced contracts, however, is that 97% of its offerings to date cost its customers substantially more than what they would have otherwise paid to the utility. See CUB Cross Ex. 15. Based on average usage, those customers induced to contract with

USESC in mid-October 2005, who have completed their contracts by October 2009, paid around \$2,500 more than the utility rate over the entire length of the contract.² *Id.*

USESC's certainty about customer preference for stability over savings is suspect in light of the volume and nature of complaints it has received, alleging promises of savings and other misrepresentations about its product. Evidence of USESC's complaint and cancellation rates demonstrates the fallacy of the Company's assertion. Moreover, Mr. Potter himself acknowledges that "many Illinois consumers are not properly educated on customer choice issues, the role of alternative gas suppliers, and the availability of new energy-related products and services made available through competitive markets." USESC Ex. 5.0 at 29, LL. 653-56. When asked whether the Company should play a role in consumer education, however, Mr. Potter testified that, "I don't think it's our job to educate consumers on the market." Tr. at 741/15 (Potter).

One obvious problem with the lack of consumer knowledge is that no one can predict what the price of gas will be years down the line. CG Ex. 1.0 at 26, LL. 523-36; Tr. at 676/3 (Alexander). Ms. Alexander concluded that "most consumers have little information or knowledge about the wholesale natural gas market." Tr. at 676/3 (Alexander). This obviously makes it very difficult for consumers to evaluate the benefits and risks of any long-term natural gas contract, especially with regard to USESC, which does not provide information regarding the historic relationship between the utility price and USESC's offered rate.

The evidence shows that, rather than helping to educate consumers, USESC's sales presentations further aggravate this lack of consumer experience with and knowledge of natural gas markets. The sales presentation is designed to make consumers believe they will save,

² Using the methodology in CUB's Gas Market Monitor (discussed in CUB Ex. 9.0, the Surrebuttal Testimony of Bryan McDaniel), those who signed on or around October 3rd paid \$2,642.85 more and those who signed on or around October 18th paid \$2,471.30 more than they would have paid the utility by the end of their contract term.

because of rising gas prices. CG Ex. 1.0 at 8, LL. 151-55. The CUB Complaints allege, among other things, that sales agents: promise savings; pose as utility workers, or representatives of CUB or the ICC; tell customers they are signing a petition to lower gas prices; and tell customers they are “eligible” for a special program. CG Ex. 1.0 at 23-24, LL. 469-93.

Additionally, USESC sales presentations make it difficult for consumers to understand what kind of deal they are getting. The sales presentations do not include a comparison that would allow customers to see how each of USESC’s product offerings has compared to the relevant utility rate, although the Company could easily include such information if it truly wanted customers to understand the product. CG Ex. 3.0 at 28-29, LL. 561-80. USESC’s marketing brochure and welcome letter include a graph depicting the historical average PGA price for Illinois gas utilities over a five-year period, but the graph in USESC’s marketing brochure, (IESC Ex. 1.5), and welcome letter, (IESC Ex. 1.6), each displays USESC’s current rate with the historic average PGA rate, but without corresponding data points for each of USESC’s offers through the same time period (the marketing brochure displays only the average utility PGA). *Id.* USESC’s training and marketing presentations emphasize the possibility of price spikes in the cost of natural gas, but fail to recognize that natural gas prices also decrease, sometimes sharply. And if customers knew USESC’s products cost more than the utility rate 99% of the time, they may find the product’s “uniqueness” to be unappealing. Nonetheless, USESC sales agents are somehow able to convince them they have the “unique” opportunity to purchase a product that is virtually certain to cost more than the utility.

Mr. Potter claims that most customers choose five-year terms because they value price certainty and long-term stability (USESC Ex. 5.0 at 21, LL. 480-81), but he based this conclusion only on his personal belief and interactions with customers – not any objective results

from customer surveys or focus groups. Tr. at 406/17 (Potter). Mr. Potter also agreed on cross-examination that, in his mind, customers who purchase USESC's long-term contracts understand that they may save money or they may pay more as compared to the utility price, but they are simply seeking stability in their gas costs. Tr. at 408/7 (Potter). Mr. Potter's beliefs, however, are belied by the Company's training material, as well as the very high cancellation rate throughout 2007 and 2008, which Mr. Potter agreed remained around 20%. Tr. at 509/8 (Potter). Either the customers who cancel do not attribute the same value to price stability that Mr. Potter suggests they do, or these customers did not understand what they were buying. In either case, customers are walking away from this transaction expecting one thing and receiving another.

USESC cries foul at CUB/AARP's and Staff's failure to consider USESC's sales activity and market share in relation to its complaint levels, (IESC Ex. 5.0 at 12-13, LL. 281-288), and that no other gas supplier offers this type of product or markets door-to-door. IESC Ex. 5.0 at 27, LL. 615-17; Tr. at 739/22 (Potter). This is a theme throughout USESC's Initial Brief and should be rejected outright because it ignores the extensive qualitative analysis of these complaints in the record. CUB/AARP do not merely criticize the raw number of complaints, but the pattern that is evident from them. Market share or sales volumes cannot explain away the evidence in this proceeding. As Ms. Jodlowska from the BBB explained on the stand, the first line of defense of every company that receives a poor rating from the BBB is to argue the complaint levels do not take sales activity into account. Tr. at 897/14 (Jodlowska). As Ms. Jodlowska clearly articulated, the number of transactions and sales is not indicative of lack of wrongdoing, because "we have seen many cases where the number of complaints is not congruent in any capacity to the number of transactions." *Id.* Rather, the BBB is fundamentally concerned – specifically with regard to allegations of misrepresentation, fraud, intentional

confusion of the consumer – about whether the complaints are “perpetual in scope” and “consistently present in complaints.” Tr. at 898/15 (Jodlowska).

Although the Company claims it does not promise savings, (USESC Init. Br. at 55), some of USESC’s training materials at least implicitly suggest future savings. The Company claims in its sales manual that it has “saved the average household \$505 for those who completed their 5-year natural gas agreements in 2005.” CG Ex. 3.0 at 27, LL. 534-42. Unfortunately for Illinois consumers, none of these savings was attributable to Illinois, since the Company did not even begin marketing in Illinois until February 2004, and only sold four- and five- year agreements at that time. IESC Ex. 5.0 at 24, L. 527. It is not surprising, then, that many consumers are lead to believe they will experience savings, whether through outright promises, or statements suggesting the potential for savings. Because the Company was only able to identify a total of ■ customers who saved, compared to what they would have otherwise paid the utility, out of a total of over ■ customers who completed their 2004 contract terms with USESC, (Tr. at 536/8 (Potter)), the Company is on shaky ground for even suggesting consumers *may* save. USESC Init. Br. at 43.

Mr. Potter would like the Commission to believe that customers who pay substantially more for USESC’s product than they would pay the utility for the same gas experience an economic benefit, just like they do with insurance. Tr. at 544/9 (Potter). Mr. Potter believes consumers are choosing between a number of different products in the market, that cannot be reasonably compared against one another, and only customers who want to “ride variable rates will stay on a utility or on a variable rate product.” Tr. at 517/11 (Potter). He compares natural gas to cell phone and internet service, as well as burglar alarm systems. *Id.* Yet, he acknowledges that none of these products, nor any other AGS product, is price regulated by this

Commission like utility gas service is. Tr. at 519/4 (Potter). And, none of the other products Mr. Potter refers are essential to the daily life of Illinois residents the way natural gas service is.

With regard to the nature of USESC's long-term contracts, USESC erroneously claims that Ms. Alexander's "only argument is that Illinois Energy's fully hedged portfolio is too stable, and therefore not worth the price." USESC Init. Br. at 42. USESC ignores the thrust of Ms. Alexander's testimony, which is that customers are not provided enough information to understand what risks and benefits USESC's product provides and cannot therefore make an educated decision about it. CG Ex. 1.0 at 32, LL. 654-58. USESC's rate includes a hedge, as well as a significant profit margin, neither of which is transparent or communicated to customers. *Id.* Ms. Alexander testified that the Company has the "ability to handle the risk that people will not want to complete this five-year deal [by selling excess gas back to the wholesale market,] instead the company wants to serve that risk on the individual customer." Tr. at 642/8 (Alexander). There is a cost for the stability USESC offers, but the marketing presentation to consumers does not reveal what this cost is. CG Ex. 1.0 at 32, LL. 654-58.

In fact, Mr. Potter explains that USESC purchases five-year strips (tranche) off of the forward market, so it knows its price for the next 5 years and can fix the price for the consumer based on that³⁴. Tr. at 726/4 (Potter). If the Company experiences a high level of cancellations in a certain period, the excess supply must be liquidated and, according to Mr. Potter, USESC must "eat" the loss when it sells gas into the market. Tr. at 730/13 (Potter). This comment obviously assumes the commodity price at the time of sale into the market would be lower than

³ When USESC counsel asked Ms. Alexander about this practice on cross-examination, he asked whether Ms. Alexander understands that the Company purchases gas "after it acquires a certain number of customers," but Mr. Potter testified that the Company determines the contract price *before* it offers the product to consumers, not after. Tr. at 639/4 (Alexander).

⁴ USESC explains that, unlike other competitors that "spec," it actually buys the supply with an expected begin date and then sells enough contracts to use up that tranche before it buys another one. Tr. at 726/4 (Potter).

what it originally cost the Company, otherwise there would be no “loss.” In fact, the Company stands to substantially gain from such a transaction. Nonetheless, this analysis contradicts Mr. Potter’s contention in testimony that the market price of gas is steadily increasing over time, making the USESC product a good deal for customers. IESC Ex. 1.0 at 4-5, LL. 89-95.

B. USESC’S TRAINING HAS PROVEN INCONSEQUENTIAL TO SALES AGENT MISCONDUCT

USESC claims that all sales contractors are required to abide by the Company’s Code of Conduct. IESC Ex. 5.0 at 7, LL. 159-160. But without enforcement, the training and the Code are meaningless. In all its discussion of the myriad training sales agents go through and the improvements to its contract and verification procedures, the Company fails to even mention the actual number of consequences issued for a violation of its policies. IESC Ex. 5.0 at 7, LL. 159-160. This is likely because, though the Company admits to thousands of allegations against its contractors, the evidence shows that only a handful of sales agents were ever disciplined at all. Even under Mr. Potter’s new three-strikes rule, instituted in February 2008 and meant to address wide-spread media and regulatory attention to surging complaints alleging contractor misrepresentation and other fraud, not a single contractor was fired as of late 2008. CG Ex. 3.0 at 26, LL. 507-15.

USESC can revise its training and verification procedures all it wants, but until sales agents in the field see consequences actually imposed for fraudulent conduct, those modifications will mean nothing. The fact that only 15 sales agents, out of the 268 that received valid allegations of misrepresentation, were ever disciplined for their action speaks louder than any sales manual. And, USESC contractors do not just see improper actions being ignored, they see them being rewarded, as the promotion of Mr. Nicholson—with 7 valid allegations of improper sales activities – to Regional Distributor clearly shows. CUB/AARP Init. Br. at 3.

C. THE LACK OF MANAGEMENT OVERSIGHT IS PERVASIVE AND REPRESENTATIVE OF USESC'S CORPORATE CULTURE

USESC claims that Regional Distributors have almost daily contact with Illinois Energy's head office in Ontario and are required to report instances of non-compliance by sales contractors. USESC Init. Br. at 24; IESC Ex. 4.0 at 7-8, LL. 151-169; Tr. at 197/13 – 198/14 (Nicholson). Regional Distributors do not, however, perform the function of managing the sales agents' compliance with the law: they do not determine compliance, they do not directly receive customer complaints, and they do not oversee sales agents in the field or accompany agents on sales calls. CG Ex. 2.0 at 18, L. 347. Both Regional Distributor witnesses testified that they do not conduct in-field training of their sales agents. Tr. at 83/ 13 (Hames); Tr. at 192/ 13 (Nicholson). When asked if he agreed this was the case, Mr. Potter said he did not know, an answer that undermines the Company's claims that the corporate office is in control of Illinois operations. Tr. at 451/17 (Potter).

Following the one visit from former V.P. of Sales, Mr. Paul Goddard when unapproved documents were found and destroyed, in February 2008, the Company indicated in discovery that no disciplinary action was taken as a result of Mr. Goddard's visit. CUB Cross Ex. 12. Yet, Mr. Potter claimed – for the first time on cross-examination – that every single contractor was pulled off the street and retrained. Tr. at 461/3 (Potter). The Regional Distributors, however, could not even recall Mr. Goddard finding unapproved documents during this visit, let alone consequences levied as a result. Tr. at 118/6 (Hames); Tr. at 221/6 (Nicholson). When probed about this discrepancy on cross-examination, Mr. Potter essentially denied that retraining was a disciplinary action and later claimed that – rather than discipline – the response of pulling every single contractor off the streets to retrain them was a “prudent decision.” Tr. at 464/13 (Potter). Considering the Company's own [REDACTED] as the

Company's initial consequence for several different types of validly-determined allegations, (CG Ex. 3.5), characterizing the Company's reaction in this case as not being discipline is disingenuous at the least.

Mr. Potter's testimony regarding the result from Mr. Goddard's visit is either impossibly contradictory, or it proves that there is simply little to no effective communication between the Regional Distributors and the head office. Both of these scenarios is extremely problematic and demonstrates the ineffectiveness of the corporate office's "management" of its Illinois operations. The fact that Mr. Goddard – who apparently imposed the very serious consequences Mr. Potter identified -- was terminated just several months after his February 2008 visit is extremely troubling.⁵ CG Ex. 3.2. Nonetheless, USESC did not provide any documentation that it made any changes to its training policies, procedures or materials as a result of the field visits to Chicago sales offices between January 2007 and September 2008. CG Ex. 3.0 at 11, LL. 214-16. Moreover, despite the supposed retraining of sales agents following Mr. Goddard's visit in February 2008, the Company's complaint levels rose throughout 2008, reaching their highest level during October and November 2008 (dispelling any notion that the instant CUB/AARP Complaint, CBS2 undercover story, or a period of higher winter bills had anything to do with complaint levels).

D. THE VOLUME AND NATURE OF COMPLAINTS REGARDING SALES AGENT MISCONDUCT AND ITS CANCELATION RATE SHOULD HAVE SERVED AS A RED FLAG TO THE COMPANY

The Company criticizes CUB/AARP's complaint analysis for making "no effort to use any acceptable analytic method of economics or other science to sort out what gross number or percentage of complaints is actually related to sales methods." USESC Init. Br. at 16. The

⁵ The Company refused to reveal in discovery and Mr. Potter was unable to explain on cross-examination the reasons for Mr. Goddard's termination. Tr. at 396/14 (Potter).

Company ignores Ms. Alexander's Direct Testimony, in which she discusses her general analysis of over 1,500 CUB Complaints and a detailed review and analysis of 232 CUB Complaints. See CG Ex. 1.0 at 7, LL. 133-34. Her detailed analysis led her to conclude that:

USESC has marketed a product to Illinois customers that was known by USESC at the time of the sale was highly unlikely to result in any economic benefit to its customers. USESC marketed this product by making it appear that it would provide a benefit to customers, by portraying its own product as potentially resulting in savings or by incorrectly portraying the utility's natural gas supply price. USESC's sales agents used techniques designed to make the customer think that they were related to an "official" activity, either by the utility itself or by a governmental agency and used the term "registration" to make customers think that there was an official imprimatur associated with the contract. USESC's agents took advantage of elderly, confused, frail, disabled, and non-English speaking household members. There is evidence that at least some of USESC's agents deliberately attempted to appear as a utility worker or misrepresented the connection between USESC's price and the utility's price for natural gas supply service.

CG Ex. 1.0 at 8, LL. 151-65. It is no surprise USESC does not find Ms. Alexander's method "acceptable," because the results show that 51% of the CUB Complaints analyzed by Ms. Alexander were related to claims of savings, 19% related to customer allegations that the sales agent was associated with the utility or other agency, 18% related to customers with elderly or non-English speakers, and 8% related to slamming. *Id.* at 7, LL. 133-34.

Ms. Alexander further testified that CUB received a total of 689 Complaints against USESC for the 12-month period February 2008 through January 2009. CG Ex. 3.0 at 20-21, LL. 397-415. The latest round of CUB Complaints in the record, from December 2008, reveal the same pattern of fraudulent conduct referenced by Ms. Alexander's review of complaints from 2007 and early 2008. CG Ex. 3.4. Ms. Alexander did not purport to do a "scientific" analysis of the CUB Complaints, nor would that assist the Commission in the least. There simply is no

“magic” number with regard to an acceptable level of complaints; one must examine the volume, nature and pattern of the complaints, because all complaints are not equal. *See* Tr. at 664/3 (Alexander).

Ms. Alexander’s detailed review of the Complaints, using her extensive knowledge and experience with consumer utility issues, is merely a starting point. What Ms. Alexander found in her analysis then served as a “red flag” to warrant further review and analysis of the Company’s training and oversight of its sales force. CG Ex. 3.0 at 19-20, LL. 383-94. The volume and pattern of allegations of misrepresentation and misleading sales tactics, slamming, unfair contract terms, and high termination fees that accompanied this high volume of complaints served as the basis for her concern. *Id.* The fact pattern and themes represented in the complaints, coupled with other evidence of ineffective management of its sales force and (later) its own significant volume of contractor allegations uncovered during this proceeding, caused Ms. Alexander to recommend that the Commission revoke USESC’s certificate to do business in Illinois. *See id.*

USESC believes, however, that there is a magic number and that the number is 2%. Mr. Potter testified that he uses a 2% threshold as a guideline for determining an acceptable level of complaints compared to sales volume. Tr. at 761/16 (Potter). However, even when it has reached the 2% threshold, the Company claims its 2% complaint ratio is “hardly a systemic defect,” (USESC Init. Br. at 16), and that such a complaint rate is “reasonable.” Tr. at 762/1 (Potter). Mr. Potter further testified that this benchmark does not involve any qualitative analysis of the underlying complaints – the 2% threshold is strictly a number. *Id.* Later, however, Mr. Potter testified that “it’s not just the complaint rate that you look at. You also have to look at

complaint types, and patterns, and that kind of thing...” (Tr. at 769/8 (Potter)), precisely the type of qualitative analysis Ms. Alexander performed, to which the company objects.

While the Company claims the Commission should balance the number of complaints against sales activity, even the Company’s own training materials acknowledge the obvious phenomenon that for every consumer who complains to the Company, there are many more who do not. CG Ex. 2.0 at 8, LL. 155-162 (USESC’s training manual states that “For everyone that complains, there are at least 25 who do not.”) Despite this recognized phenomenon, the Company maintains that a 2% ratio of complaints to sales activity is acceptable, without review of the nature or type. Even assuming, *arguendo*, that each and every complaint to CUB, the Commission, the AG, the BBB, and the Company itself was a result of the consumer’s misunderstanding of USESC’s product rather than outright misrepresentation – and they are not – this too is an unacceptable result. USESC cannot be allowed to excuse away its marketing failures.

To be sure, throughout this case, USESC has attempted to explain away the complaint levels and the trends evidenced therein by challenging the veracity of CUB’s complaints. For example, in its brief USESC argues that the complaint totals CUB cites include “consumer inquiries” as well as legitimate complaints and the numbers are, therefore, artificially inflated. But as Ms. Alexander explained in her testimony, she excluded general inquiries from the 232 CUB Complaints she reviewed in detail in her Direct Testimony, each of which related to sales agent misconduct. CG Ex. 1.0 at 7, LL. 133-34. Ultimately, however, the Company has made clear that it is comfortable with the same level and nature of complaints that were recognized as extremely problematic by CUB/AARP and Staff and caused this action to be filed.

The “value” USESC claims inherent in its “unique” product is the ability for customers to lock in their price of gas for an extended period of time. The problem is that the marketing presentation does not reveal – and sales agents are not trained to reveal – the premium that is being charged to customers to provide this alleged value. Thus, consumers generally do not have sufficient information to make an educated decision about the value of this risk management feature. Even if we assume consumers want to purchase such a risk management tool, “it is not possible to determine what value customers may attach to this feature,” because customers are not informed of it. CG Ex. 2.0 at 18, LL. 361-65.

The fact that many customers do not understand what they are buying is evidenced in USESC’s consistently high cancellation rates. USESC reported a total of 13,408 customer cancellations between February and November 2008⁶. CG Ex. 3.0 at 18, LL. 353-57. The total cancellations in October 2008 and November 2008 were the highest all year. *Id.* Considering those time frames do not reflect higher winter bills, and do not correspond to any focused media on the issue, it shows that customers were still cancelling at a very high rate as this time last year. *Id.*

Faced with such a high cancellation rate, the Company should have concluded that either its marketing practices did not accurately and/or effectively explain the product or that the marketing practices resulted in selling a product that a large percentage of customers did not want or value once they understood it or saw the resulting prices on their monthly utility bills.

CG Ex. 2.0 at 22, LL. 449-53.

Through much of 2008, the total rate of cancellations was about 60% when contracts that never became valid and were cancelled due to a failed credit check are included. Tr. at 499/9

⁶ This number differed from what Mr. Potter provided in his Rebuttal Testimony, but he agreed on cross-examination that the 13,408 number in CUB Cross Ex. 14 is the appropriate number to use to describe customers that have actively cancelled their contracts during the referenced time period. Tr. at 503/21 (Potter).

(Potter). This significant statistic should have provided several red flags to the Company that: 1) its marketing practices did not accurately and/or effectively explain the product; 2) customers do not want or value the long-term price stability of the product, once they fully understand what it is; and/or 3) the Company is selling contracts predominantly in areas with a high rate of failure due to credit check. The fact that USESC ignored these warning signs and failed to take corrective action is added evidence of why the Commission needs to take strong action to protect consumers from further abuse.

E. CCR'S INVESTIGATION PROCESS IS NOT EFFECTIVE IN ROOTING OUT SALES AGENT MISCONDUCT

USESC emphasizes the “investigation” performed by CCR when an allegation of sales agent misconduct is received. USESC Init. Br. at 23. The Company’s process of determining the “validity” of customer allegations, however, is highly subjective and often boils down to a he said/she said type of situation. Tr. at 490/8 (Potter). This is true even where the evidence of fraud was painfully obvious, as in the case of Ms. Vargas. In that case, Ms. Findley could only say she had “reasonable grounds to believe” that a forgery occurred, and not that it actually occurred. Tr. at 338/16 (Findley). As argued in CUB/AARP’s Initial Brief, there is a great deal of judgment involved with its CCR investigation process and determining whether to issue consequences for actions. Considering how few consequences are actually imposed, this judgment overwhelmingly favors the sales agent over the customer. Only in rare and unquestionable cases like Ms. Vargas’ will the Company issue swift consequences against its agents.

After claiming documentation about consumer complaints did not exist, and objecting and refusing to respond to questions regarding consumer complaints, the Company finally turned over thousands of pages of documents from its CCR Compliance Database in December 2008.

CUB/AARP Init. Br. at 24. The Company tracks consumer complaints alleging sales agent misconduct through this database, which tracks 19 established categories of misconduct. Ms. Alexander calculated the total allegation letters issued in 2007 and 2008 regarding valid instances of “misrepresentation” or price, savings, the nature of the agreement or the relationship between USESC and the utility as 1,730 points against 268 different contractors. CG Ex. 3.0 at 24-25, LL. 487-98. Despite this, the Company can only substantiate 15 contractors who received any consequences at all. *Id.*

One likely reason for the large discrepancy in the amount of allegations received and the consequences issued – aside from the Company’s preferred theory that customers are lying to get out of their contracts (IESC Ex. 2.0 at 7, LL. 147-50) – is CCR’s reliance on the paper contract and the phone verification call. However, as argued at length in CUB/AARP’s Initial Brief, the presence of the sales agent on the porch in many cases supersedes disclosures in the contract or on the verification call that takes place simultaneously with the sale. CUB/AARP Init. Br. at 5. And, the verification call provides cold comfort for customers like Ms. Vargas, who was slammed despite the fact that the verification agent clearly suspected a fraud was occurring, but confirmed the transaction anyway.

Although on cross-examination Mr. Potter would not verify the accuracy of Ms. Alexander’s allegation data summary, the Company did not dispute this data. Tr. at 487/21 (Potter). In fact, USESC verified the data response and did not challenge Ms. Alexander’s Surrebuttal Testimony on it during cross-examination. The Commission should reject any attempt to now deny its validity.

As discussed in CUB/AARP’s Initial Brief, the CCR investigation process is extremely subjective. CUB/AARP Init. Br. at 28. This subjectivity overwhelmingly favors the Company’s

own agents. For example, when describing what type of qualitative analysis Mr. Potter performs in reviewing a complaint, he looks at when a complaint comes in relative to when it was signed. *Id.* He believes that, if there is a time lag between when the customer signed the contract and when they called to complain, there is therefore “not a lot of validity” to that complaint. Tr. at 772/16 (Potter). Mr. Potter’s perspective fails to consider that those customers could have either been slammed, or simply did not realize that they had switched to a different supplier, because they thought the sales agent was with the utility. Customers often do not realize this until receiving higher winter bills, when they may examine their gas bill more closely.

Further hampering the Company’s corporate process for handling allegations of misconduct is the fact that Regional Distributors, who manage the sales offices, do not have managerial authority to discipline sales agents. Tr. at 98/19-20 (Hames); Tr. at 205/3 (Nicholson). CCR handles all contractor discipline by issuing Allegation and/or Penalty letters to agents, when a complaint is received from a customer. Tr. at 340/20 (Findley). Consequences resulting from a certain accumulation of points, or for some other reason, come from the CCR group in the form of a letter to the sales agent with the Regional Distributor copied. The Regional Distributor does not, however, implement the consequence. He only speaks to the sales agent in a conference call with corporate, and may participate in additional coaching or in-field training. Tr. at 107/21 (Hames). In fact, Mr. Hames, a Regional Distributor for the Company’s downtown loop office, testified that he does not even understand what the point values mean. *Id.* Given the admitted subjectivity of the CCR process, the Company’s method of addressing allegations clearly fails to protect consumers from the marketing abuses CUB/AARP have documented throughout this Complaint.

F. THE COMPANY’S REMEDIAL MEASURES DO NOT ADDRESS THE KEY PROBLEM ON THE PORCH AS EVIDENCED BY USESC’S PERSISTENTLY HIGH COMPLAINT RATE

The Company claims it is “taking proactive measures to determine whether a corrective action is needed.” USESC Init. Br. at 26. The “key” changes it mentions are adding a box to the contract, reducing the termination fees, and changes to its welcome letter. *Id.* at 26-27. These changes, however, do not address the “key” problem identified by CUB/AARP and Staff witnesses: that written disclosures do not make up for or correct the overwhelming influence of a sales agent on the porch. Further, USESC pats itself on the back for reducing its termination fee to a maximum of \$375 (in February 2008), and reducing it again to \$50 in January 2009, when shortly thereafter the General Assembly found only \$50 total to be reasonable⁷. This can hardly be considered going “above and beyond,” as the Company claims. USESC Init. Br. at 59.

The Company also takes credit for a steady decline in informal complaints and inquiries “during the time period at issue, and beyond, which coincides with improvements initiated by the Company.” USESC Init. Br. at 27. The evidence proves otherwise. While Mr. Potter testified that the *number* of complaints declined 26% from 2007 to 2008, (IESC Ex. 5.0 at 43, LL. 976-79), this is not the whole picture. Mr. Potter also admitted on cross-examination that this claimed improvement did not take into account sales activity, the very statistic the Company regularly criticized Ms. Alexander and Mr. Agnew for ignoring. When the decrease in sales activity in 2008 is taken into account, Mr. Potter acknowledged that the complaint *rate* was about the same from 2007 and 2008. Tr. at 509/4 (Potter). This is true, despite a decrease in complaints in the summer and fall of 2008, a decline typical during non-heating months. CG Ex. 3.0 at 20, L. 398.

⁷ Ms. Alexander pointed out on cross that though the Company changed its termination fee to \$50 before the legislative amendment was passed, “the import of that law was well known among the supplier community for months before it took effect.” Tr. at 656/14.

G. USESC’S LIQUIDATED DAMAGES CLAUSE UNREASONABLY HIGH AND HAS RESULTED IN TIDY PROFITS FOR THE COMPANY

During 2007 and 2008, the Company billed a total of \$13.2 million in termination fees from Illinois consumers (residential and business combined), of which \$7.9 million was billed to Illinois residential consumers. CG Ex. 3.0 at 19, LL. 367-73. Of these amounts, the Company actually collected \$2.4 million, \$1.5 million of which was from residential consumers. *Id.* Thus, aside from the astronomical premium inherent in USESC’s rate of around [REDACTED] per therm, Tr. at 640/15 (Alexander), which almost always means customers pay substantially more than the PGA – in some cases thousands of dollars more – the Company has made a tidy profit from termination fees, as well. The Company only lowered its termination fees after Commission Staff stepped in, responding to months of high complaint volumes and allegations of termination fees in the thousands coming to light. But even then, the new provision allowed the Company to charge up to a total of \$375 dollars. This was a small concession, considering the later amendment to the AGSL, passed by the Illinois General Assembly in Spring 2009 limited termination fees to a total of \$50, among other things. 220 ILCS 5/19-100. While the Company boasts that the lower termination fees are just one of many changes it has made to respond to customer concerns, the record shows otherwise.

Despite the hugely profitable termination fees collected by USESC, the Company often waives this fee if certain types of customers seek to cancel service. USESC uses a Matrix to determine for which type of customer it will waive termination fees. CG Ex. 1.0 at 32-35, LL. 659-708. A significant number of termination fees are either reversed or not pursued as either “an accommodation, a consequence of re-enrollment [pursuant to a retention initiative] or a negotiated settlement.” *Id.*, citing USESC Response to CSD 2.12. Ms. Alexander concluded that this policy is discriminatory, because only those that seek to cancel are made aware of it. *Id.*

Those customers who could qualify for a termination fee waiver are not made aware of this opportunity. *Id.* Some customers who seek to cancel service are instead convinced by USESC to re-enroll at a lower rate. This type of retention initiative, which is premised on the threat of a termination fee often in the hundreds – or even thousands – of dollars, would dampen the effect of those seeking to cancel and lower the cancellation rate.

H. CFA & DTPA VIOLATIONS

USESC argues that it should not be construed as violating the Illinois Consumer Fraud and Deceptive Business Practices Act (“CFA”) or the Illinois Deceptive Trade Practices Act (DTPA), because CUB/AARP cannot show that any misconduct occurred or that the Company directed or tolerated a single instance of misconduct. USESC Init. Br. at 67, 72. USESC maintains its theme that, because the CUB Complaints have not been proven to be true, the Commission cannot find a violation of law. USESC implicitly admits to at least two instances of deceptive conduct regarding CUB’s two lay witnesses, Mr. Zermeno and Ms. Vargas, but claims that, because it terminated the agents involved, the Company cannot be held responsible for those acts. *Id.* at 72. Illinois law, however, requires USESC to effectively manage its sales force and to be legally responsible for the actions of its agents, when those actions are ratified by the Company. Moreover, the consequence of the Company’s argument is to give its sales agents essentially free reign: regardless of the infractions, the Company is held harmless. The Commission cannot allow this result.

USESC sales agents operate pursuant to an independent contractor agreement, which constitutes a principal-agent relationship. Illinois courts have made clear that the distinguishing characteristic of an agent is that he represents another contractually. *Hoffman & Morton Co. v. American Ins. Co.*, 35 Ill. App. 2d 97, 102, *citing* Mechem, *Outlines of the Law of Agency*, 1952

Ed, p 4. When properly authorized, he makes contracts or other negotiations of a business nature on behalf of his principal, by which his principal is bound. *Id.* An agent is generally defined by the Illinois courts as being “one who undertakes to manage some affairs to be transacted for another by his authority, on account of the latter, who is called the ‘principal,’ and to render an account.” *Id.* A fiduciary relationship arises out of the principal-agent relationship as a matter of law. *Ransom v. A.B. Dick Co.*, 289 Ill. App. 3d 663, 672, *citing Gunther v. Commonwealth Edison Co.*, 126 Ill. App. 3d 595, 672 (1984); Restatement (Second) of Agency §§ 1, 13, at 7, 58-60 (1958).

USESC argues that, even if the Company was found to be vicariously liable for the acts of its sales agents, this legal liability does not demonstrate violation of the “any other laws” provision of the AGSL. USESC Init. Br. at 68. Under the doctrine of apparent authority, a principal can be held vicariously liable in tort for injury caused by the negligent acts of his apparent agent, if the injury would not have occurred but for the injured party’s justifiable reliance on the apparent agency. *O’Banner v. McDonald’s Corp.*, 173 Ill. 2d 208, 213 (1996), *citing Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 523-34 (1993). The idea is that if a principal creates the appearance that someone is his agent, he should not then be permitted to deny the agency if an innocent third party reasonably relies on the apparent agency and is harmed as a result. *Id.* CUB submits this doctrine fully supports the vicarious liability of USESC for the acts of its sales agents.

While the legal doctrine of apparent authority and vicarious liability is typically reserved for torts, (*See In re Berry Publishing Services, Inc.*, 231 B.R. 676 at 682 (1999)), it dictates the confines of the principal’s *legal responsibility* for acts of its agent. In this proceeding, the Company’s own evidence demonstrates violations of the CFA, through misrepresentations and

other fraudulent conduct of USESC’s sales agents. USESC argues that “one or two isolated instances of rogue sales contractor misconduct would not show that the Company itself failed to comply with the CFA.” USESC Init. Br. at 69. The evidence in this record clearly shows a systemic pattern of contractor misconduct. The Company submitted its own records of sales agent allegations determined to be valid. CG Ex. 3.0 at 24-25, LL. 484-98. Those records show the Company issued consequences for wrongdoing rarely, demonstrating the corporate culture of turning a “blind eye” to sales agent misconduct. *Id.*

Here, the liability at issue – USESC’s violation of the CFA – also falls under the doctrine of “ratification.” USESC is liable for the acts of its sales agents, because it ratified the practice of misleading and fraudulent sales tactics by not effectuating consequences on the myriad sales agents found to have allegations of misrepresentation against them. Ratification of an unauthorized act is tantamount to an original authorization and confirms what was originally unauthorized. *Horwitz v. Holabird & Root*, 212 Ill. 2d 1, 14-15 (2004), citing *Jones v. Beker*, 260 Ill. App. 3d 481, 485 (1994). The principle behind the doctrine of ratification is that the person ratifying secures a benefit through the actions of another who is acting on his behalf with apparent or implied authority. *Swader v. Golden Rule Insurance Co.*, 203 Ill. App. 3d 697, 704-05 (1990). If there is no benefit, ratification will not be implied. *Jones*, 260 Ill. App. 3d at 485; see also *Stathis v. Geldermann, Inc.*, 295 Ill. App. 3d 844, 858 (1998) (ratification may be inferred from surrounding circumstances, including long-term acquiescence, after notice, to the benefits of an allegedly unauthorized transaction).

In this case, the obvious benefit to USESC of the complained-of practices, discussed at length in Ms. Alexander’s testimony and CUB/AARP’s Initial Brief, is profiting off the sale of its product. USESC’s ratification of its sales agent misconduct is evident in the extensive and

persistent acquiescence to the sales agent misconduct documented by the Company in its own record of valid allegations. Despite the thousands of allegations received by the Company regarding sales agent misconduct – recorded by USESC in 19 distinct categories – record evidence of consequences actually imposed by USESC on sales agents is scarce. Only a tiny fraction of sales agents ever receive consequences for misconduct alleged by customers. See CUB/AARP Init. Br. at 27. This tells the Commission that, in a large majority of cases, the Company either determines that 1) the agent did not deserve any consequences at all, despite customer allegations of misconduct; or 2) it is simply asleep at the switch. In both cases, the Company is ratifying the sales agent misconduct and neither case inspires confidence in the Company’s ability to effectively manage its sales force.

The Consumer Fraud Act provides an even broader consumer protection than does the common law action of fraud or negligent misrepresentation since the Act also prohibits any “deception” or “false promise.” *Buzzard v. Bolger*, 117 Ill. App. 3d 887, 893. There is a clear mandate from the legislature to the courts to use the Consumer Fraud Act to the utmost degree to eradicate all forms of deception and unfair business practices. *Id.* The case cited by USESC in defense of CUB/AARP’s CFA claim actually states “[i]t is not enough to show a single course of deceptive conduct by a defendant toward a plaintiff: Plaintiff must show defendant has engaged in deceptive practices in promoting its goods or services to its market in general.” *Bonfield v. AAMCO Transmissions, Inc.*, 708 F. Supp. 867, 882 (N.D. Ill., 1989). CUB/AARP and Staff have done just that, as argued at length in both Initial and Reply Briefs and evidenced in the substantial volume and egregious nature of complaints against USESC. Nor does the “clear and convincing evidence” standard of proof apply here, as claimed by the Company. USESC Init. Br. at 13, *citing Fox v. Heimann*, 375 Ill. App. 3d 35, 47 (this ruling was limited to common law

fraud, which is not being alleged here.) Evidence of USESC's multiple violations of the CFA is found in the raw number of validly-determined allegations in the Company's own records, the lack of issued consequences against the agents responsible, together with the lack of managerial oversight of its sales force, all establishing a course of deceptive conduct. The DTPA similarly prohibits any conduct that "creates a likelihood of confusion or misunderstanding." 815 ILCS 510/2(a).

Ms. Alexander examined 232 of CUB's Complaints in detail in her Direct Testimony, all of which alleged misconduct like various types of misrepresentation and slamming. Each of these constitutes a separate violation of both the CFA and DTPA. Thus, at the very least, the 232 substantial and repeated violations of both the CFA and the DTPA simultaneously represent substantial and repeated violations of the PUA's obligation to "comply with other applicable laws and rules." 220 ILCS 19-110(e)(5) and 19-115(b)(2). Thus, the remedies outlined in CUB/AARP's Initial Brief are not only warranted, but necessary to protect consumers from further marketing abuses.

I. USESC'S OWN DOCUMENTS DEMONSTRATE THAT IT MARKETS HEAVILY IN LOW-INCOME AND LOW-CREDIT AREAS

USESC argues that it does not target low income or minority customers. USESC Init. Br. at 34. Its own documents belie this claim. CUB Cross Ex. 11 consists of a detailed list of contracts obtained by zip code and the "credit acceptance ratio" by zip code. In this exhibit is an internal note discussing the methodology and review of this information. The "Results" comment states the following:

It appears that the bulk of the Contracts signed since July are from lower Credit Areas. We need to make sure that the IL Regionals are pushing their agents away from these lower credit areas, so we can improve our Conversion Ratios. Since the bulk of all

Contracts are from Chicago, I think we need to use Mappoint to plot out the good Chicago Areas from the bad.

CUB Cross Ex. 11, USE 008590. Thus, not only does this provide further support for CUB/AARP's claim that the Company does, at the very least, provide guidance to its sales agents on where to market, it shows that the Company was aware of the heavy concentration of contracts obtained in lower credit areas in the City of Chicago.

USESC criticizes CUB witness McDaniel's testimony regarding targeted marketing of its sales agents for not including the data relating to suburban locations. USESC Init. Br. at 35. As Mr. McDaniel explained on cross-examination, he did not cherry pick the data to suit his desired result. He was simply limited in what analysis could accurately be conducted by the data itself. Because the suburban towns listed in CUB Cross Ex. 1 have more than one zip code within them, and no zip code data was presented for them, it was impossible to determine which areas were targeted. Tr. at 849/12 (McDaniel). Considering the Company's own documents acknowledge that the bulk of all contracts come from the City of Chicago, this limitation on Mr. McDaniel's analysis is not problematic.

USESC's claims of double counting are equally unfounded. USESC argues that Mr. McDaniel did not take into account the fact that some zip codes span more than one ward. USESC Init. Br. at 36. First, none of the Company's math is in the record and is not properly included in brief, without CUB/AARP's ability to challenge it. Second, CUB Cross Ex. 1 clearly shows certain zip codes showing up more than once in a single email, when several wards within a zip code were targeted. Thus, including those zip codes twice in the count of marketing efforts is entirely valid because there were multiple marketing efforts within that zip code. Mr. McDaniel explained in his testimony that his Exhibit 8.3 meant to show the number of marketing

efforts in the highest vs. the lowest zip codes. When viewed in conjunction with his Exhibit 8.2, which maps the 13 zip codes targeted most often (based on information in CUB Cross Ex. 1), it became clear that USESC most heavily targets to lower income areas in the south and west sides of Chicago. Though the Company justifies the correlation between marketing efforts and low income by claiming these areas represent sales agents' residences, a point Ms. Alexander disputes, this fact is of little consequence to the customers actually being solicited.

USESC also challenges the credibility of Mr. Zermeno with criticisms that ignore the everyday reality of immigrants living in large, urban areas such as Chicago. The Company essentially accuses Mr. Zermeno of lying, because since he has lived in the United States for 17 years and his daughter attends a public school in Chicago, he must speak enough English to have understood the terms of his USESC contract when he signed it. USESC Init. Br. at 32. But the record shows otherwise. Ms. Findley herself testified that the CCR specialist who reviewed Mr. Zermeno's case determined that he did not speak English as a first language. IESC Ex. 2.0 at 6-7, LL. 135-138.

If a Spanish speaking customer does not appear to understand English, Mr. Hames instructs English-speaking sales agents in his office to hand the customer off to a Spanish-speaking sales agent. Tr. at 144/11 (Hames). In the case of Mr. Zermeno, however, the sales agent decided to ignore that policy and pursue the sale. Even if a customer is deemed to speak sufficient English to understand the sales agent, sales agents are supposedly trained to offer the customer a Spanish-speaking verification call. Tr. at 142/2 (Hames). Here again, Mr. Zermeno was not offered a verification call in Spanish. Nonetheless, USESC then uses the verification call as additional evidence that Mr. Zermeno understood the contract he was entering into because he was able to recite his account number in English and answer "yes" at appropriate

times during the call. CUB Ex. 7.0 at 3, LL. 64-91. But Mr. Zermeno testified that the sales agent stood next to him and prompted him when and how to answer the questions on the verification call. *Id.* Mr. Zermeno's case is a prime example of how non-English speaking consumers are taken advantage of by USESC's aggressive door-to-door sales tactics.

III. REMEDIES

USESC argues that the Commission cannot find a violation of both the CFA (or DTPA) and AGSL, because to do so would constitute double recovery. USESC Init. Br. at 69. By virtue of USESC violating the CFA, however, it simultaneously violates the AGSL. In his ruling on the Company's Motion to Dismiss portions of CUB/AARP's Complaint, the ALJ ruled with respect to counts V. and VI. (relating to violations of the CFA and DTPA, respectively), that "the specific cause of action alleged in Count V is arguably included in - not excluded from - the grant of authority in subsection 19-120(b)(1). That subsection explicitly provides jurisdiction over purported violations of Sections 19-110 and 19-115, and compliance with "all other applicable laws' is required by those statutes." The conduct all relates to additional violations of the AGSL, and the relief requested is within the Commission's jurisdiction in Section 19-120 of the AGSL. Thus, CUB/AARP's remedies do not constitute double relief. Violations of the CFA and DTPA would constitute non-compliance with the "applicable laws" provisions in Sections 19-110 and 19-115 of the PUA, which triggers the penalties in Section 19-120. The Commission has sufficient evidence to conclude that USESC has violated the CFA and the DTPA, and therefore the AGSL.

CUB/AARP reiterate their requests for relief here. Pursuant to its authority under the AGSL, CUB/AARP request that the Commission revoke USESC's certificate of service

authority and order USESC to cease its Illinois operations. 220 ILCS 5/19-120(c)(3). The evidence demonstrates that violations of the AGSL were substantial and repeated, ranging from managerial incompetence throughout 2007 and 2008 (violation of 220 ILCS 5/19-110(e)(1)), to the Company's own evidence of 1,845 validly-determined allegations of misrepresentation and slamming, to the 232 instances of misrepresentation and slamming identified in Ms. Alexander's direct testimony (violations of 220 ILCS 5/19-110(e)(2) and 19-115(c)), uncontroverted evidence that Ms. Vargas was slammed, (violations of 220 ILCS 19-115(c)), and Mr. Zermeno's testimony regarding misrepresentations of a USESC sales contractor (violations of 220 ILCS 19-110(e)(2)).

If the Commission determines that revocation of USESC's certificate is not warranted, CUB/AARP alternatively request that the Commission issue a cease and desist order, pursuant to 220 ILCS 5/19-120(c)(1), to prevent USESC from marketing its product door-to-door, and conduct an independent management audit of USESC's management and oversight of its marketing and sales practices, to be performed at USESC's expense, or modify USESC's certificate of service authority to prohibit door-to-door marketing.

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

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

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

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

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

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

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

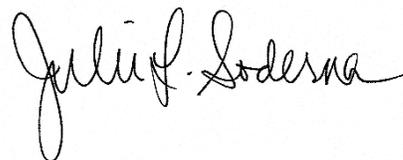
IV. CONCLUSION

WHEREFORE, CUB/AARP respectively request the Commission grant the relief requested in this and our Initial Brief and revoke the certificate of convenience of USESC.

Dated: December 17, 2009

Respectfully submitted,

CITIZENS UTILITY BOARD



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