

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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

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**CITIZENS UTILITY BOARD’S MOTION TO STRIKE  
PORTIONS OF USESC REPLY BRIEF**

NOW COMES the Citizens Utility Board (“CUB”), through its counsel, Julie L. Soderna, and hereby requests, pursuant to the Commission Rules of Practice (“Rules”), 83 Illinois Administrative Code Section 200.190, the Illinois Commerce Commission (“Commission”) strike the portions of USESC’s Reply Brief identified herein as arguing facts outside evidence.

1. On December 17, 2009, Illinois Energy Savings Corp. d/b/a U.S. Energy Savings Corp., now d/b/a Just Energy Corp., (referred to herein as “USESC” or the “Company”), filed its Reply Brief responding to arguments raised in the Initial Briefs of CUB/AARP and Staff of the Illinois Commerce Commission (“Staff”).
2. In their argument, USESC references facts not in the evidentiary record, in contravention of Section 10-103 of the Public Utilities Act (“PUA”), which defines “record” evidence as including “only the transcript of testimony and exhibits together with all papers and requests filed in the proceeding including, in contested cases, the documents and information described in Section 10-35 of the Illinois Administrative

Procedure Act.” 220 ILCS 5/10-103. Section 10-35 delineates the following as constituting record evidence:

- (1) All pleadings (including all notices and responses thereto), motions, and rulings.
- (2) All evidence received.
- (3) A statement of matters officially noticed.
- (4) Any offers of proof, objections, and rulings thereon.
- (5) Any proposed findings and exceptions.
- (6) Any decision, opinion, or report by the administrative law judge.
- (7) All staff memoranda or data submitted to the administrative law judge or members of the agency in connection with their consideration of the case that are inconsistent with Section 10-60.
- (8) Any communication prohibited by Section 10-60.  
No such communication shall form the basis for any finding of fact.

ILCS 100/10-35.

3. Second, because the response was not offered into evidence in this proceeding, the parties have no way to examine the response, or test the accuracy of the response through additional discovery or cross examination. The response does not explain how the number under the “validity column” was determined, when it was used, how it was used or what purpose it served. CUB/AARP witness Barbara Alexander addressed what constituted a “validly-determined complaint” by the Company in her testimony, and CUB/AARP offered in brief her conclusions. This column obviously did have a purpose, and considering the term that is at issue here is “Validity,” the conclusions drawn by Ms. Alexander were entirely reasonable. See CG Ex. 3.0 at 24-25. The Company failed to introduce any additional record evidence to challenge her conclusions.

4. On pages 14-15, 20 and 28, the Company claims that the documents it provided to the parties in response to requests for production of sales agent allegation and consequence data 1) should not be interpreted in the manner Ms. Alexander interpreted them in her Surrebuttal Testimony, 2) are “unreliable” and 3) are “inaccurate.” *Id.* USESC claims that the “validity” column in the Agent Allegations Reports that CCR group send to Regional Distributors “does not represent a determination that the complaint was valid.” USESC Reply Br. at 14. USESC goes on to assert that “Complainants know that the presence of a number in that field does not represent a determination that the complaint was valid,” and cite to a discovery request to support their contention. *Id.*
5. The portions of the brief referencing information in this data response, or any other information purporting to explain the “Validity” column in the allegation data should be stricken from the record for the following reasons:
6. First, and most importantly, the discovery request referenced at pages 14-15 in USESC’s Reply Brief in nowhere in the evidentiary record in this proceeding. Although counsel for the Company had ample opportunity to cross-examine Ms. Alexander on her Surrebuttal Testimony at the evidentiary hearing, they failed to do so.
7. Second, even assuming the accuracy of the discovery response referenced in USESC’s brief, which is not part of the evidentiary record in this proceeding, it does not explain how the number under the “validity column” was determined, when it was used, how it was used or what purpose it served. This column obviously did have a purpose, and considering the term that is at issue here is “Validity,” the conclusions

drawn by Ms. Alexander were entirely reasonable. See CG Ex. 3.0 at 24-25. The Commission will afford Ms. Alexander's testimony the weight it deserves, bearing in mind it was based on the Company's own verified discovery responses. There is no additional record evidence to challenge her conclusions, and therefore this record evidence was properly relied upon in brief.

8. Third, CUB/AARP relied upon the Company's verified responses to discovery in this proceeding in developing their case, as they are entitled to do. CUB data request 6.32 sought documents to support the following statement by Regional Distributor William Nicholson: "When head office receives an allegation associated with a contractor from my office, they send me the information together with the applicable consequence." USESC Ex. 3.0 at 6, LL. 123-25. The request CUB 6.32 was served on the Company on October 23, 2008, and the Company responded on November 21, 2008. The response to CUB 2.53 sought the number of instances in which the "possible consequences" occurred in Illinois in 2007 and 2008. This request was served on July 11, 2008, though the Company did not provide any substantive response until December 5, 2008. Each of these responses was verified by Duncan Stiles, V.P. of Operations. Considering each discovery request sought information and documents regarding sales agent "consequences," the Company's claim in brief that such evidence is inaccurate should be stricken, because it was the Company's obligation to ensure the record accurately reflected testimony regarding its own discovery responses.
9. USESC's allegation that CUB/AARP "deliberately mislead" the Administrative Law Judge and the Commission has no place in their brief. USESC Reply Br. at 15.

Aside from their inflammatory and false nature, the statements are based on extra-record evidence and therefore not appropriate to argue in brief. CUB/AARP are significantly prejudiced by the Company's comments about this information being included for the Commission's determinations in this proceeding, because, had the Company introduced their characterization and explanation of this data in the record in some form, CUB/AARP would have then been allowed the opportunity to rebut it – an opportunity that no longer exists.

10. USESC further complains that CUB/AARP should not have offered the Agent Allegation Reports as evidence, because they knew the information to be inaccurate. USESC Reply Br. at 15. USESC's complaints regarding this testimony have no place in brief, considering it did not timely object to the referenced testimony. The Company had ample opportunity to challenge this evidence at any point prior to or during the trial, but it did not. The testimony at issue Ms. Alexander's Surrebuttal Testimony, was filed on January 28, 2009, nearly 11 months ago. Nonetheless, the Company never moved to strike the referenced information; nor did they challenge this information on cross-examination, when the testimony was entered into the record in this proceeding. Moreover, CUB/AARP most certainly did not know this information was inaccurate, because 1) the Company's response was verified as true and correct, and 2) the Company never provided a complete response to the subsequent discovery request seeking clarification of this information (CUB 9.03).
11. CUB provided the Company with the platform to challenge Ms. Alexander's testimony on cross-examination. Tr. at 485/2 (Potter). When asked if he reviewed Ms. Alexander's testimony on cross-examination, Mr. Potter indicated he had

generally, but was unable to “verify” her numbers were correct. Tr. at 487/6 (Potter). During this discussion, Mr. Potter questioned Ms. Alexander’s summary of the data responses, but could not speak specifically to the numbers and conclusions in her testimony, nor offer contradictory or explanatory evidence. *Id.* Mr. Potter certainly did not at that time explain what the “validity” column represented (or, for the matter, did not represent), during the course of this cross-examination.

12. CUB requests that the Commission strike the highlighted sections of USESC’s Reply Brief, attached hereto as Attachment A, in order to protect the record in this proceeding from facts not in evidence and to prevent prejudice to CUB/AARP.

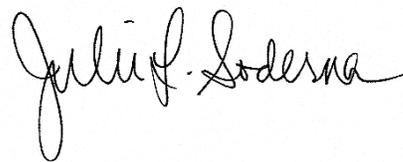
### CONCLUSION

WHEREFORE, CUB respectfully requests that the ALJ strike the portions of USESC’s Reply Brief highlighted in Attachment A for the reasons articulated herein.

Dated: December 22, 2009

Respectfully submitted,

CITIZENS UTILITY BOARD



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