

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

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

**CITIZENS UTILITY BOARD AND AARP
APPLICATION FOR REHEARING**

CITIZENS UTILITY BOARD
Julie L. Soderna
Director of Litigation
309 W. Washington, Suite 800
Chicago, Illinois 60606
312-263-4282
312-263-4329 fax
jsoderna@citizensutilityboard.org

AARP
Richard C. Balough
Attorney
1 N. LaSalle St., Suite 1910
Chicago, Illinois 60602
312-499-0000
rbalough@balough.com

Dated: May 14, 2010

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

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

**CITIZENS UTILITY BOARD AND AARP'S
APPLICATION FOR REHEARING**

NOW COMES the Citizens Utility Board (“CUB”) and AARP, (collectively “CUB/AARP,” “Consumer Groups,” “CG,” or “Complainants”), through their counsel, pursuant to 83 Illinois Administrative Code Section 200.880, hereby submit their Application for Rehearing in the above-captioned proceeding. The Illinois Commerce Commission (“ICC” or the “Commission”) entered its final Order (“Order”) in this proceeding on April 13, 2010 and served the Order on the parties on April 14, 2010. In its final Order, the Commission found several violations of law relating to U.S. Energy Savings Corp.’s (“USESC” or the “Company”) specific fraudulent sales activity and use of misleading marketing materials. The Commission erred, however, in not revoking USESC’s certificate of service authority, and in not finding additional violations and associated remedies that were fully supported by the record and the Order itself. Further, the Commission erred as a matter of fact and law in its discussion regarding its jurisdiction over consumer complaints.

I. INTRODUCTION

CUB/AARP request rehearing on several of the Commission's conclusions, which are inconsistent with the record evidence in this proceeding and the governing law. First, the record in this proceeding supports revocation of USESC's certificate of service authority. The record demonstrates that USESC management has systematically failed to recognize, analyze or make serious attempts to eradicate the consistent trend of misleading and fraudulent marketing tactics of its sales agents that persisted throughout the relevant Complaint period (January 2007 through March 2008 – PO at 7 – herein referred to as the “relevant time period”). CUB/AARP Init. Br. At 19; CUB/AARP Reply Br. At 5; CUB/AARP BOE at 2. In addition to the multiple violations of the Alternative Gas Supplier Law (“AGSL”) found by the Commission, Complainants and Staff of the Illinois Commerce Commission (“Staff”) further proved that USESC does not possess the managerial fitness to continue to operate in a lawful manner in Illinois, a conclusion substantiated by the Commission's analysis of the Company's management deficiency. Order at 13-28. The Commission should therefore avail itself of the strongest remedy available to protect consumers: revocation of USESC's certificate of service authority.

Second, the Commission erred in not finding a violation of the Public Utilities Act's (“PUA”) requirement that an Alternative Gas Supplier (“AGS”) “maintain sufficient managerial resources and abilities to service its customers.” 220 ILCS 5/19-110(e); 220 ILCS 5/19-115(b). The record evidence and the Commission's own analysis on this matter fully support the finding of a violation of these sections of the AGSL, yet such finding is markedly absent from the Order. Concomitantly, the Commission should impose additional fines for these management failures to make the punishment commensurate with the harm they caused consumers.

Third, the Commission erred in finding that it does not have the authority to find a violation of either the Illinois Consumer Fraud and Deceptive Business Practices Act (“CFA”) or the Illinois Deceptive Trade Practices Act (“DTPA”). Order at 4-5. Such a finding misconstrues the law and would eviscerate the Commission’s ability to effectively regulate AGS as the legislature intended.

Fourth, if the Commission rejects Complainants request to suspend or revoke USESC’s certificate of service authority, Complainants request that the Commission ensure that the audit plan and the final audit report be publicly filed with the Commission in order to maintain the utmost transparency in the process and ensure public confidence in its outcomes.

Finally, the Order’s discussion of Complainant’s interference in the Commission’s regulatory purview by filing, taking and resolving consumer complaints distorts the record evidence, underestimates the efficacy of ICC’s own Consumer Services Division (“CSD”) and ignores CUB’s own statutory mandate. Complainants therefore request that this language be stricken from the Order.

The Commission need not hold additional hearings in this matter to reach the conclusions suggested herein, because no new evidence is required to reach such conclusions. The record is extensive and complete and fully justifies the relief requested. Accordingly, Complainants request that the Commission correct its May 13, 2010 Order as requested herein.

II. ARGUMENT

A. THE RECORD SUPPORTS REVOCATION OF USESC’S AGS CERTIFICATE

CUB/AARP will not restate the entirety of argument or the extensive record evidence that supports revocation of USESC’s certificate of service authority to operate as an AGS.

CUB/AARP refer the Commission to their Initial and Reply Briefs and Brief on Exceptions for the legal and factual support for revocation. CUB/AARP Init. Br. at 17; CUB/AARP Reply Br. at 17; CUB/AARP BOE at 4. The egregious nature and far-reaching impacts of the Company's mismanagement of its sales force, impacts that affected no fewer than thousands of consumers during the relevant complaint period, fully justifies imposing such a serious measure. The record evidence that supports both the violations found by the Order and those justified by the Order's analysis (as discussed below), meets the "substantial and repeated violations" requirement in the PUA and therefore provides the Commission with the proper authority to revoke USESC's certificate of service authority. 220 ILCS 5/19-120(c)(3).

USESC's history of refusing to undertake actions on its own accord, in the midst of thousands of complaining customers and litigation in multiple arenas, provides little assurance to the Commission that the Company can be trusted to make the necessary changes regarding the management of its sales force to prevent further marketing abuses. Its long and persistent history of management failure and questionable marketing activity, along with a record replete with evidence regarding the Company's own recognition of and failure to act on deceptive and misleading marketing activity speaks volumes to this Commission. Considering that the Company has persisted in denying any management failure throughout this proceeding and believes it has always been in full compliance with the law, it has demonstrated no ability to recognize and address management failure. There is no evidence in this record that allowing USESC another chance to try to "clean up its act" is a reasonable course.

B. THE RECORD AND THE COMMISSION'S OWN ANALYSIS JUSTIFY FINDING THAT USESC VIOLATED THE AGSL REQUIREMENT TO MAINTAIN SUFFICIENT MANAGERIAL RESOURCES

The Commission’s analysis regarding the significance of customer complaints and the Commission’s authority to relate such complaints to management insufficiency fully support finding a violation of the AGSL requirement that an AGS maintain sufficient managerial resources to provide the service for which it seeks a certificate of service authority, 220 ILCS 5/19-110(e)(1). Order at 13-28. The Commission’s discussion and analysis in this section of the Order leads to only one conclusion: USESC failed to maintain sufficient managerial resources to serve its desired customer base. Nonetheless, after no less than 16 pages of analysis directed to this end, the Commission fails to actually find a violation of this AGSL requirement. The following statements, taken from the Commission Analysis section of the Order on the issue of management sufficiency, support and require the finding of a violation of 220 ILCS 5/19-110(e)(1):

- “An important threshold question posed here is whether customer complaints correlate with management sufficiency. The Commission believes that they do.” Order at 13.
- “Mr. Potter thus confirms the Commission’s view that complaint volume is an indicator of provider ‘underperformance’ and management deficiency.” Order at 14.
- “Staff also maintains that high-volume and similar complaints indicate ‘that the Company is not properly managing its sales force.’ Staff Ex. 1.0 at 18. The Commission concurs.” Order at 14.
- “When a provider in a competitive market generates customer disapproval at a level far above industry norms, there is a question of management deficiency.” Order at 14.
- “The case for management insufficiency only grows stronger when the *nature* and *repetition* of customer complaints are added to the analysis.” Order at 17.

- “It is troubling to the Commission that a supplier would trigger this degree of consumer disapproval, and that the market disturbance goes without correction over many months. While a company’s management may need some period of time to recognize the nature and magnitude of the problem, the 15-month duration involved here is far too long.” Order at 18.
- “The General Assembly put AGS under Commission jurisdiction to ensure more than the formal trappings of management. It expected *effective* management.” Order at 18.
- “Respondent’s compliance management was plainly inadequate to the task of precluding adverse consequences for itself and the public during the relevant time frame.” Order at 18.
- “For the reasons already set forth, the volume, nature and repetition of consumer complaints correlate with management sufficiency. That maxim is derived not only from the Commission’s long experience as the regulator of the retail, intra-state energy market, but also from the testimony of Consumer Groups witness Alexander, our Staff’s consumer services unit, a representative of the BBB and the company’s own testimony.” Order at 19.
- “The purpose of that directive [Section 19-110(e)(1)] is to match the performance of the gas provider with the perceptions and expectations of the customer base. Customer complaints reflect a mismatch. Responsibility for that mismatch lies with the provider’s management.” Order at 21.
- “Bluntly, it would not make sense to direct the Commission to evaluate an applicant’s ‘financial, technical and managerial resources and abilities,’ then (in a separate sentence) limit that evaluation to the characteristics of the customer base and the question of facilities ownership. The far more rational view is that the legislature

accorded us broad power to assess an applicant's financial, technical and managerial attributes and (in a separate sentence) obligated us to factor customer base and facilities ownership into that broad assessment. Otherwise - to take Respondent's theory to its logical extension - the Commission would lack authority to consider, among other things, an applicant's debt load, prior business practices, criminal history or safety record. The Commission has never so limited its appraisals of the entities we regulate and the legislature and appellate courts have never told us to do so." Order at 22.

- "Accordingly, the Commission strongly rejects the notion that it lacks the power to consider the volume and nature of customer complaints as a measure of managerial sufficiency within the meaning of the AGSL." Order at 23.
- "The Commission does not agree that every conceivable attribute of management deficiency must be codified in a statute or administrative regulation for an AGS to be accountable for it. *** Within the limits of the arbitrary and capricious standard, the Commission needs a degree of flexibility to achieve that legislative goal." Order at 27.

These statements and conclusions need not be supplemented or altered to justify the finding of a violation of 220 ILCS 5/19-110(e)(1). Nor is any additional evidence necessary to support such a finding. In fact, Staff and Complainants largely based their respective cases on the Company's failure to adequately manage its sales force, considering this was the thrust of the evidence uncovered during the course of the proceeding. CUB/AARP Init. Br. at 25; CUB/AARP Reply Br. at 17; CUB/AARP BOE at 4; Staff Init. Br. at 4; Staff Reply Br. at 40. Thus, the strength of this evidence and the extensive and thorough Commission analysis and conclusion in the Order regarding that evidence can lead to only one conclusion: USESC

violated the AGSL requirement to maintain sufficient managerial resources to provide the service for which it is certificated.

Additionally, the Commission specifically justified the audit as a corrective measure as a result of the “number and seriousness of complaints against the company and its violations of the AGSL.” Order at 49. However, the Commission does not correspondingly find a violation associated with the “number and seriousness of complaints,” mentioned as support for the audit and discussed thoroughly in Section D(1)(b) of the Order. Accordingly, the Commission should find that the Company also violated Section 19-110(e)(1) .

With regard to penalties associated with management insufficiency, Complainants argued that, since the impact of the Company’s incompetent management tainted each and every contract signed during the relevant period, a reasonable and appropriate calculation of violations should be based on every contract signed during this period, since each of those contracts was impacted by the Company’s insufficient and incompetent management of its sales force (or approximately 151,250). CUB/AARP BOE at 6. However, at a bare minimum, the Commission must find at least one violation of the requirement to maintain sufficient managerial resources in order to remain consistent with its analysis and conclusions relating to the Company’s management insufficiency. 220 ILCS 5/19-110(e)(1). The Commission should therefore concomitantly impose additional financial penalties for USESC’s management failure, which results in a minimum additional penalty of \$10,000 to the Company.

C. THE COMMISSION ERRED IN FINDING THAT IT DOES NOT HAVE THE AUTHORITY TO DETERMINE VIOLATIONS OF THE CFA OR DTPA

The Commission erred as a matter of law in concluding that violations of other relevant laws and rules must first be found by a court of competent jurisdiction before the Commission may itself find a violation has occurred. Order at 4. The PUA requires the Commission to

examine whether USESC has complied with “all other applicable laws and rules” for the purposes of determining whether a violation of AGSL has occurred. Despite agreeing with a June 2008 ruling by the Administrative Law Judge (“ALJ”) that the CFA and the DTPA are “other applicable laws and rules,” the Commission then concludes these claims “cannot be brought before us.” Order at 5. These two conclusions are inconsistent and do not reflect a fair interpretation of the law or the Commission’s legislative mandate. The Commission’s interpretation of the statutes and caselaw would eviscerate the Commission’s authority over enforcing the PUA and effectively regulating AGS.

The Order incorrectly interprets both the statutes and the pertinent case law to conclude that, in order to determine PUA violations, Complainants must first prove in district court that unlawful act or practices in fact took place under the CFA or DTPA. *Id.*¹ This conclusion directly contradicts prior Commission rulings in this regard. The Commission has previously noted that the distinguishing factor in determining Commission jurisdiction is whether a plaintiff’s action is one for reparations or remedies under the PUA, or civil damages. See *Beecham v. AT&T*, Docket No. 03-0421, 2003 Ill. PUC Lexis 1026 at 6 (December 17, 2003), citing *Consumers Guild of America, Inc. v. Illinois Bell Tel. Co.*, 103 Ill. App. 3d 959, 962 (1981) and *Village of Evergreen Park v. Commonwealth Edison Co.*, 296 Ill. App. 3d 810, 813 (1998). Here, the remedies sought are exclusively within the Commission’s jurisdiction under the AGSL.

The legislature clearly intended the Commission to examine compliance with a wide variety of laws, regulations, policies, practices. The primary rule of statutory interpretation is to first ascertain and give effect to the intention and meaning of the legislature. *People ex rel.*

¹ The Order applies the same analysis to both the CFA and DTPA claims, and in both cases concludes that jurisdiction to determine violations of those statutes resides in Circuit Court. Order at 40.

Hanrahan v. White, 52 Ill. 2d 70, 73 (1972). The first guide to determining legislative intent and meaning is the plain language of the statute itself, which must be construed to both give each word within the statute meaning and to avoid rendering any part of the statute meaningless or void. *Sylvester v. Indus. Comm’n (Acme Roofing & Sheet Metal Co.)*, 197 Ill. 2d 225, 232 (2001), citing *McNamee v. Federated Equipment & Supply Co.*, 181 Ill. 2d 415, 423 (1998)). In construing a statute, courts must presume that the General Assembly, in its enactment of legislation, did not intend absurdity, inconvenience or injustice. *People v. Lieberman*, 201 Ill. 2d 300, 308-309 (Ill. 2002), citing *Michigan Avenue National Bank*, 191 Ill. 2d 493, 504 (2000), *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 362-63 (1986). “Statutes must be construed in the most beneficial way which their language will permit so as to prevent hardship or injustice, and to oppose prejudice to public interests.” *Id.*, citing *Mulligan v. Joliet Regional Port District*, 123 Ill. 2d 303, 313 (1988); see also *Illinois National Bank v. Chegin*, 35 Ill. 2d 375, 378-79 (1966). The Illinois Appellate Court likewise ruled that “it is a well established rule that the express grant of authority to an administrative agency also *includes the authority to do what is reasonably necessary to accomplish the legislature’s objective.*” *Abbott Laboratories, Inc. v. Illinois Commerce Commission*, 289 Ill.App.3d 705, 712, 682 N.E.2d 340, 347 (1997) (emphasis added).

The ALJ correctly concluded that the key question was the meaning and intention of the phrase “all other applicable laws and rules.” ALJ June 4, 2008 Ruling at 2. Empowering the Commission to consider laws outside the PUA does not inevitably – or even typically – produce absurd results. *Id.* at 5. Instead, it allows the Commission to carry out its duty to oversee the competitive marketplace for natural gas suppliers, monitor compliance with PUA’s requirements and protect consumers. As the ALJ noted, the Commission is directed to look beyond the PUA

for the purpose of enforcing the PUA. Here, the pertinent phrase in Section 19-110(e)(5) regarding “all other applicable laws and rules” is not explicitly limited to the PUA (that is, it does not refer to “all other provisions of this Act” or something similar).

The Commission has recognized that misleading or deceptive practices can harm all customers, by inflicting economic harm on those customers who are actually misled, by sowing confusion in the marketplace, and by diminishing the market-wide benefits associated with efficient and fair competition. *CUB v. Illinois Bell Tel. Co.*, Docket 00-0043, 2001 Ill. PUC Lexis 124 at 27 (January 23, 2001). Marketing practices can be both deceptive and anti-competitive, and in turn, unjust and unreasonable under the PUA. *Id.* at 28. In *CUB v. Illinois Bell*, the Commission accepted the recommendation of Staff, the Attorney General and CUB that it look to the Consumer Fraud Act, Illinois and federal judicial precedent, and rulings by the Federal Communications Commission and Federal Trade Commission. *Id.* The Commission concluded that the CFA expresses the “evolved public policy of this state with regard to consumer protection.” *Id.* at 34. As such, the Commission concluded “that legislation, along with judicial interpretations of its terms, provides valuable guidance as we establish contemporary boundaries for just and reasonable marketing.” (In that case, the marketing was by a public utility.) *Id.* The Commission concluded that the CFA addresses practices that the General Assembly, in Section 505/2, presumes to be harmful in the marketplace. *Id.*

In *CUB v. Illinois Bell*, the Commission accepted the recommendation of Staff, the Attorney General and CUB that it look to the CFA, Illinois and federal judicial precedent, and rulings by the Federal Communications Commission and Federal Trade Commission. *Id.* The Commission concluded that the CFA expresses the “evolved public policy of this state with regard to consumer protection.” *Id.* at 34. As such, the ICC concluded “that legislation, along

with judicial interpretations of its terms, provides valuable guidance as we establish contemporary boundaries for just and reasonable marketing,” and the CFA, while not directly enforced by the ICC, “constitute[d] sound public policy.” *Id.* at 76. The Commission concluded that the CFA addresses practices that the General Assembly, in Section 505/2, presumes to be harmful in the marketplace. *Id.* Actual harm to competition was unnecessary to support a finding of anti-competitive, misleading, or deceptive practices, and whether those practices were unjust and unreasonable under the PUA. *Id.*

Here, Complainants do not seek direct enforcement of the CFA or DTPA, but do request enforcement of the AGSL. Enforcement of the AGSL requires the Commission to examine whether USESC has complied with “all applicable law and rules,” which includes the CFA/DTPA. Complainants alleged, and the ALJ’s Proposed Order concluded, that USESC violated the CFA and DTPA in several instances. In finding violations of these statutes, the Commission is not directly enforcing them, but concluding that USESC sales practices are misleading, deceptive and harmful to the marketplace and therefore deserve to be penalized within the boundaries of the PUA. The Commission would be acting well within its jurisdiction and grant of authority by the legislature in so finding. Complainants therefore request that the Commission adopt the findings in the ALJ’s Proposed Order regarding violations of the CFA and DTPA, and impose the maximum penalties associated therewith.

D. THE AUDIT SHOULD BE CLARIFIED TO ENSURE THE AUDIT PLAN AND AUDIT REPORT ARE TRANSPARENT TO THE PUBLIC

As Complainant’s argued in their Brief on Exceptions, in addition to a final audit report, the Commission should require monthly compliance measures and monthly audit reports containing the results of the implementation and effectiveness of (a) hiring, training, solicitation procedures and performance; (b) targeting of specific communities and demographics; (c)

compensation; (d) sales verification; (e) complaint tracking and reporting process, (f) discipline and other compliance practices. CUB/AARP BOE at 15. This safeguard will help ensure that the audit is being conducted in the most effective manner.

Additionally, the Commission's Order should make clear that the audit plan, monthly audit reporting results, and the final audit report should all be filed publicly with the Commission. To do otherwise would contradict the PUA and the Commission's own rules of practice. The PUA requires that Commission proceedings, records and evidence to be publicly disclosed, (220 ILCS 5/10-101), and that documents filed with the Commission are open for public inspection, (220 ILCS 5/5-109). The Commission's Rules of Practice require full disclosure of all relevant and material facts, and assembly of a complete public record. 83 Ill. Adm. Code Sections 200.250, 200.340, and 200.530.

The Commission is authorized to enter orders to protect "the confidential, proprietary or trade secret nature of any data, information or studies," only when the entity seeking designation demonstrates a "compelling interest at risk." 83 Ill. Adm. Code Section 200.430(a); 232 Ill. App. 3d 1068. Illinois courts, however, have narrowly construed the compelling interest standard and place the burden of demonstrating it squarely on the entity seeking to avoid disclosure. See *Cooper v. Department of the Lottery*, 266 Ill.App.3d 1007, 1012 (1994). The Commission itself ruled that a compelling need to restrict public access may be found only if there is direct, specific factual evidence that disclosure is likely to cause substantial harm to the proponent's competitive position. *Cass Long Distance Services, Inc. and Cass Telephone Company, Petition for emergency relief to protect Petitioner's Annual Report from disclosure for not less than 5 years in order to protect highly proprietary information*, ICC Docket No. 98-0060, Order at 33 (March 10, 1999).

In this case, because the audit is a remedy imposed in response to the number and seriousness of consumer complaints against USESC, with the “objective to substantially reduce customer complaints and violations of the AGSL,” (PO at 49), there is no conceivable compelling interest in keeping the results of such remedy from the public. In effect, the harm to USESC’s competitive position has already occurred by virtue of the Commission’s Order. The audit plan and results regarding the Company’s performance should be therefore available for public inspection.

Staff, in its recent response to USESC’s Motion for Extension Time seeking additional time to propose a third auditor recommendation, agrees and argued that “in Staff’s view, the names of the proposed auditors, the auditor proposals, the audit plan, and any reports, especially the final audit report, should be made public. If the final audit report was confidential, Staff would be prohibited from disclosing the results of the audit to determine whether the Company has complied with the Order’s corrective measures. This lack of transparency goes against the public interest in general, and specifically against the goals of the Commission’s Order in requiring the Company to undergo an audit as a corrective measure.” Staff Response to USESC Motion for Extension of Time at 5-6. Thus, the Commission should ensure that the audit plan and reports are publicly filed, and allow only information that meets the substantial harm test, if any, to be redacted.

E. THE COMMISSION SHOULD DELETE THE DISCUSSION ON PAGES 5-6 OF THE ORDER REGARDING ITS REGULATORY OVERSIGHT AS IT IS FACTUALLY INACCURATE, IRRELEVANT AND UNNECESSARY, AND CONTRARY TO RECORD EVIDENCE

In its Order, the Commission makes several broad claims about Complainants’ interference with the Commission’s regulatory process. The Commission claims that Complainants’ practice of taking – and resolving – consumer complaints before those complaints

can be brought within the Commission’s “regulatory purview” leaves the Commission “blind with regard to any facts, alleged misconduct or resolutions of a Company actively in business in Illinois.” Order at 6. The Commission further states that “the Commission’s CSD is the professional arm of state government that can and should address these issues.” *Id.* The Commission’s statements in this regard ignore CUB’s statutory mandate to protect and advocate on behalf of consumers and ignores the involvement and efficacy of the Commission’s own CSD regarding consumer complaints, and the evidence put forth in the instant docket by CSD Staff witness Jim Agnew.

The Illinois General Assembly created CUB in 1983, and gave the nonprofit, nonpartisan organization a clear mission: to represent the interests of residential utility customers across the state. The CUB Act directs CUB to carry out that mission by intervening in ratemaking proceedings before this Commission, in the courts and before other public bodies and by providing consumers with information and assistance regarding utilities. 220 ILCS 10/5(2)(e), (i). The CUB Act directs CUB to “represent and protect the interests of the residential consumers of this state,” (220 ILCS 10/5(a)), and “provide information and advice to utility consumers on any matter with respect to utility service,” (220 ILCS 10/5(i)). To carry out its mandate to provide information and advice to consumers with questions, concerns or disputes regarding utility service, CUB developed a Consumer Advocacy Department to act as advocates “with the goal of obtaining a resolution that’s favorable to the consumer.” Tr. at 805:16-18 (Gendusa-English). Thus, in taking and resolving consumer complaints regarding utility service, CUB is acting in accordance with its own legislatively-authorized mandate.

In the instant Complaint proceeding, CUB utilized the over 1,500 complaints it received regarding USESC during the relevant time period as the factual basis for the allegations in the

Complaint.² In substantiating their claims that USESC violated certain provisions of the AGSL, Complainants introduced the testimony of a national expert on consumer-related utility issues, Barbara Alexander, who performed a detailed analysis of several hundred of CUB's consumer complaints regarding USESC from certain months during the relevant time period. See CG Ex. 1.0 at 5, LL. 106-110. In conducting this detailed analysis, on which Ms. Alexander largely based her testimony and recommendations, she excluded those complaints that either originated from a prior settlement between CUB and USESC (the "2006 CUB-USESC Settlement"), or were merely inquiries and not complaints. *Id.*

Mr. Agnew subsequently filed very similar testimony to Ms. Alexander's based on the experience and consumer complaints taken by the Commission's CSD. Mr. Agnew testified that CSD customer contacts from 2005 through October 2008 for all alternative gas suppliers was 1,991, of which USESC accounted for 1,336, or about 67%. Staff Ex. 1.0 at 4-5, LL. 83-86. Mr. Agnew further testified that 847 of the USESC customer contacts were made during the relevant time period. Staff Ex. 1.0 at 6, LL. 111-113. Mr. Agnew *did not* distinguish between complaint and mere inquiry regarding the 847 consumer contacts, but *did* identify the number of complaints associated with various areas of concern to CSD regarding the Company's sales performance, including many of the same concerns articulated by CUB in its Complaint and detailed in Ms. Alexander's testimony. Staff Ex. 1.0 at 6-7. Mr. Agnew testified that the CSD office "has received a large volume of complaints against USESC dealing with very similar consumer concerns over a sustained period of nearly four years." Staff Ex. 1.0 at 8, LL. 161-63; Order at

² Some of these contacts were from non-customers, so may more appropriately be considered "inquiries." However, often consumers contact CUB regarding a company like USESC when they want to "report that they received a visit from the solicitor and felt it was a high pressure sales pitch that was suspicious in some way" (Tr. at 809:5-8 (Gendusa-English)) – even when they did not sign up. This information is important for the obvious policy reason that such negative consumer experience reveals the Company's failure to adequately manage its sales force, yet would not otherwise be captured in any formal way (i.e. a Commission informal or formal complaint).

11. On cross examination, Mr. Agnew further testified that “we keep seeing this oscillation of complaints in our records. I think we need to find a solution to it...” Tr. at 965:18-21 (Agnew). The Order itself cites to the following conclusion by Mr. Agnew: “when heavy volume...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 need to be identified and addressed on a system-wide rather than an individual basis.” Staff Ex. 1.0 at 7; Order at 11-12.

Mr. Agnew’s testimony clearly shows that the Commission’s CSD does, in fact, do precisely what the Commission’s Order claims it is prevented from doing by Complainants: fulfill its statutory mandate to “determine the level and severity of complaints” and “conduct the appropriate analysis contemporaneous with the alleged misconduct or complaint.” Order at 6. That CUB’s consumer complaint records mirrored the Commission’s own CSD records during the relevant time period should come as no surprise to the Commission. Nor should it surprise the Commission that CUB filed the instant Complaint against USESC in response to the sustained level and egregious nature of complaints against USESC identified by its own CSD. The mere fact that more consumers sought assistance from CUB than the Commission’s CSD to resolve disputes with USESC during this period is irrelevant to the allegations in the Complaint initiating this proceeding, considering the Commission considered the totality of the evidence, including the Commission CSD’s own complaint records, in making its determinations in this Docket.³

Though the record does not reveal whether CSD communicated to the Commissioners its concerns regarding USESC’s demonstrated and extremely problematic track record (as identified

³ The Commission’s statement that Complainants “actively sought customer complaints against USESC” (Order at 5), is incorrect and irrelevant for two reasons: 1) CUB cannot manufacture negative customer experiences with USESC out of whole cloth; and 2) the Commission CSD, which did not engage in any media contact regarding USESC, produced its own evidence of a substantial number of customer complaints against USESC, complaints that mirrored CUB’s complaints in both quantity and substance.

in Mr. Agnew's testimony), CSD's knowledge of and concern about USESC's sales activity throughout the relevant time period is abundantly clear in the present record. This evidence not only corroborates, but, in fact, supports many of the Commission's own conclusions, as the Order itself recognizes:

For the reasons already set forth, the volume, nature and repetition of consumer complaints correlate with management sufficiency. That maxim is derived not only from the Commission's long experience as the regulator of the retail intra-state energy market, but also from the testimony of Consumer Groups witness Alexander, our Staff's consumer services unit, a representative of the BBB and the company's own testimony.

Order at 19.

Mr. Agnew further testified that of the 1,705 customer contacts regarding USESC from February 2004 to October 2008, 1,236 were submitted through the Commission's regulatory process as informal complaints. Staff Ex. 1.0 at 5, LL. 90-93. Of the 1,236 informal complaints, just 20 were escalated through the Commission's formal docketed complaint process. The other 1,200-plus complaints were presumably resolved by CSD and the Company before being escalated to a docketed proceeding (likely using the same or similar process CUB's Consumer Rights Counselors use to resolve complaints informally). Of the 20 formal complaints, only three were ultimately disposed of by the Commission on the merits; the other 17 were settled by the Company and dismissed by the Commission with prejudice before the Commission had a chance to review the record and "exercise its duties" to "address and correct any issues when warranted." Order at 6. Indeed, 13 of the 20 formal complaints were filed before CUB initiated the instant complaint proceeding.

Resolution of CUB's 2006 Complaint against USESC (ICC Docket No. 06-0337, or "2006 CUB Complaint") need not have constrained the Commission from taking action against

USESC at any time, if it thought such action were warranted. Indeed, the 2006 CUB-USESC Settlement did not foreclose CUB from filing the instant Complaint, based on its own evidence of a consistent, continuing pattern of abusive marketing despite the commitments made in the settlement, nor did that settlement tie the Commission's hands in any way in resolving the instant Complaint. In its Order, the Commission found violations of the AGSL based on the significant record evidence supporting such findings, and required USESC to comply with certain corrective measures to remedy those violations. The 2006 CUB-USESC Settlement did not impede such findings on the current record.

The PUA specifically preserves the Commission's authority to act on its own motion. 220 ILCS 5/10-110 ("But nothing in this Act shall be taken to limit or restrict the power of the Commission, summarily, of its own motion, with or without notice, to conduct any investigations or inquiries authorized by this Act, in such manner and by such means as it may deem proper, and to take such action as it may deem necessary in connection therewith."). Neither the resolution by CUB of individual consumer complaints nor the 2006 CUB-USESC Settlement foreclosed the Commission from independently taking action against USESC based on its own evidence of USESC sales agent misconduct. The Commission's claim that this Complaint is the first time it has been made "officially aware" of the alleged violations of USESC, (Order at 6), is similarly factually inaccurate considering the Commission was aware of the allegations in the 2006 CUB Complaint, as well as the 20 formal consumer complaints against USESC and over a thousand USESC informal CSD complaints over a several year period, at a minimum. It is unclear why the Commission chose not to exercise its statutory authority considering it had its own evidence of USESC misconduct, but none of CUB's actions prevented the Commission from doing so. The Commission's statements positing that CUB prevented it from determining

the “proper and timely regulatory solutions” (Order at 6) or that Complainants “legally hobbled the Commission’s ability to take any appropriate and timely corrective measures” (*id.*) are in error, contradict record evidence and the law and should be deleted from the Commission’s Order.

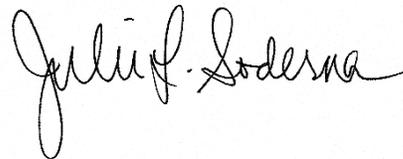
III. CONCLUSION

WHEREFORE, CUB/AARP respectfully request that the Commission grant the requested relief articulated herein.

Dated: May 14, 2010

Respectfully submitted,

CITIZENS UTILITY BOARD



Julie L. Soderna
Director of Litigation
CITIZENS UTILITY BOARD
309 W. Washington, Ste. 800
Chicago, IL 60606
(312) 263-4282 x112
(312) 263-4329 fax
jsoderna@citizensutilityboard.org

AARP ILLINOIS



One of its Attorneys
Richard C. Balough

Attorney at Law
1 N. LaSalle St., Suite 1910
Chicago, IL 60602
312-499-0000
rbalough@balough.com