

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Northern Illinois Gas Company)	
d/b/a Nicor Gas Company)	
)	Docket No. 12-0569
Proposed Establishment of Rider 17)	
Purchase of Receivables with)	
Consolidated Billing.)	

**VERIFIED RESPONSE TO THE VERIFIED MOTION TO QUASH
OF THE CITIZENS UTILITY BOARD
AND THE PEOPLE OF THE STATE OF ILLINOIS**

The Retail Energy Supply Association ("RESA") and Interstate Gas Supply of Illinois, Inc. ("IGS Energy"), by and through their counsel, the Law Office of Gerard T. Fox and Quarles & Brady LLP, pursuant to Section 200.190 of the Rules of Practice of the Illinois Commerce Commission (the "Commission") (83 Ill. Admin. Code 200.190), respectfully responds to the Verified Motion to Quash ("Motion to Quash") of the Citizens Utility Board ("CUB") and the People of the State of Illinois ("AG") as follows:

Introduction

The CUB/AG Motion to Quash should be denied. The Motion is a transparent attempt to prevent the appropriate discovery of information through a properly noticed deposition from a purported expert witness for CUB/AG, Martin R. Cohen. (A copy of the Notice of Deposition for Mr. Cohen's deposition is attached as Exhibit A to this Response.) CUB and the Commission Staff have used depositions to examine multiple witnesses in the course of Commission proceedings. (See, e.g., ICC Docket No. 01-0705/02-0067/02-0725 (cons.); ICC Docket No. 08-0175.) Nothing in the CUB/AG Motion to Quash justifies preventing other parties from using that same discovery tool in this case. Importantly, and consistent with recent Illinois Supreme Court precedent, Mr. Cohen's deposition is likely both to lead to admissible evidence and to narrow and clarify the issues

needing examination at the Evidentiary Hearing, thus enhancing the efficiency of this proceeding. (See *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 346. 875 N.E.2d 1065, 1075 (2007) (discovery to be used to "narrow the issues in order to expeditiously reach a disposition which fairly vindicates the rights of the parties.") quoting *Sander v. Dow Chem. Co.*, 166 Ill. 2d 48, 65, 651 N.E.2d 1071, 1079 (1995).)

In multiple places, the Commission's Rules of Practice emphasize the importance of the presentation of full and reliable information. For example, the Commission's Rules suggest that Commission discretion should be exercised to protect the "[i]ntegrity of the fact-finding process":

The principal goal of the hearing process is to assemble a complete factual record to serve as basis for a correct and legally sustainable decision.

(83 Ill. Admin. Code 200.25(a).) Similarly, the Commission's "Policy on Discovery" provides:

It is the policy of the Commission to obtain full disclosure of all relevant and material facts to a proceeding.

(83 Ill. Admin. Code 200.340.)

Likewise, in order to empower parties to obtain full factual disclosure, the Public Utilities Act ("Act") expressly provides that:

[A]ny party may, in any investigation or hearing before the Commission, **cause the deposition of witnesses** residing within or without Illinois to be taken in the manner prescribed by law for like depositions in civil actions in the courts of this State and to that end may compel the attendance of witnesses and the production of papers, books, accounts and documents.

(220 ILCS 5/10-106) (Emphasis added). To reiterate that point, the Section 200.360(a) of the Commission's Rules of Practice uses the *exact same language* as 220 ILCS 5/10-106 under the heading "Depositions and Other Discovery Procedures." (83 Ill. Admin. Code 200.360(a).)

In short, there is nothing objectionable or exceptional about the scheduled deposition of Mr. Cohen. On the contrary, the deposition is entirely consistent with the Act, the Commission's Rules

of Practice, and the general Illinois law on discovery, which has the purpose of enabling "the parties to obtain the fullest possible knowledge of the issues and facts before trial...". (Nichols Illinois Civil Practice, vol. 3 §44.4 (2011).)

Mr. Cohen's Positions in this Proceeding
Support the Taking of His Deposition

Mr. Cohen is presented in this proceeding as a witness on behalf of CUB and the AG. In his pre-filed written testimony, Mr. Cohen opposes Commission approval of the Rider that is the subject of this proceeding. That Rider would create an optional Purchase of Receivables ("POR") program in Nicor's already-existing, Commission-approved competitive retail natural gas program known as the "Customer Select" program. Although the subject of this proceeding is the proposed POR Rider and nothing more, Mr. Cohen's angle of attack veers considerably from the legally determinative question of whether the Rider is "just and reasonable." (220 ILCS 5/9-201(c).) Instead, to put it plainly, Mr. Cohen attempts to put on trial not just the proposed tariff or even Nicor's Customer Select program, but much more broadly, competitive retail natural gas programs in general.

As a threshold matter, Mr. Cohen's anti-competition approach is plainly at odds with the Act, numerous Commission decisions, and years of pro-competitive public policy. The Act long has provided for retail natural gas choice, and contains an entire Article that regulates the provision of competitive service and those who provide that service. (*See* 220 ILCS 5/19-105, *et seq.*) If there was any doubt about the General Assembly's continuing support of a robust natural gas competitive market, it was resolved by the General Assembly's recent amendment of Section 19-130. (*See* 220 ILCS 5/19-130, amended by P.A. 97-223, eff. Jan. 1, 2012.) That amendment requires the Commission's Office of Retail Market Development to prepare an annual report this year that not only identifies "barriers to the development of competitive retail natural gas markets in

Illinois" but also discusses "solutions to overcome identified barriers." (*Id.*) Plainly, as the Commission found in the 2011 Ameren Illinois Company Natural Gas Rate Case, that section conveys the General Assembly's continued endorsement of natural gas competition in Illinois.

The Commission finds the language of Section 19-130 to be pro-competitive, noting that Section 19-130 appears to presume that there should be competitive markets in Illinois, with an apparent mandate to the ORMD to identify barriers to the development of those competitive markets and propose solutions to eliminate those barriers.

(ICC Docket No. 11-0282, Final Order dated January 10, 2012 at 193)

Of course, for years, the Commission has "consistently advocate[d] the position that competitive forces, where viable, best protect consumers' interests." (Annual Report on the Development of Natural Gas Markets in Illinois, July 2007, at 5, available at <http://www.icc.illinois.gov/reports/Results.aspx?t=4>, IGS Energy Cross Ex. at 5.) Accordingly, the Commission has determined that "Small volume transportation programs for small commercial and residential customers are an important component of the Illinois retail gas markets" (*id.* at 6), and has opposed actions that would have "an incrementally adverse impact on supply competition" as "inconsistent with our policy of expanding customer choice." (*See* ICC Docket Nos. 07-0241/-0242 (cons.), Final Order dated February 5, 2008 at 304.) The Commission recently reiterated its long-standing pro-competitive position:

The Commission notes that it has long had a policy favoring competition in the energy markets, and the Commission believes that **customers will generally benefit from being given the opportunity to participate in a well-designed competitive market.**

(ICC Docket No. 11-0282, Final Order dated January 10, 2012 at 193) (emphasis added).

In the face of these pro-competitive laws and decisions, Mr. Cohen invokes something called the CUB Gas Market Monitor in an attempt to criticize the way in which the competitive natural gas market is functioning. The Gas Market Monitor appears on CUB's website and purports

to show "whether plans offered by unregulated gas companies have saved or are saving money." (<http://www.citizensutilityboard.org/GasMarketMonitor.php>; *see also* CUB-AG Ex. 1.0 at 14:343-357 (Mr. Cohen's Direct Testimony).) In fact, the Gas Market Monitor is a highly-biased and misleading, anti-competitive tool intended to scare and confuse consumers and -- as is apparent from Mr. Cohen's citation to it in this proceeding -- influence decision-makers. Mr. Cohen's reliance on the flawed CUB Market Monitor taints the basis for his testimony and raises serious questions about Mr. Cohen's credibility and qualifications to present expert testimony in this proceeding.

While CUB/AG have responded to some written discovery regarding the CUB Market Monitor and related items in Mr. Cohen's written testimony, those responses raise as many questions as they answer. For example, although Mr. Cohen invokes the CUB Market Monitor as a reliable source of information to criticize the competitive market and thereby oppose the POR Rider, and although Mr. Cohen was the *Executive Director* of CUB at the time that the Gas Market Monitor was being developed, the Data Request Responses are vague, and assert that he has no personal knowledge of the CUB Market Monitor. (*See, e.g.*, Responses to RESA-IGS - AG/CUB 1.03, 1.11, 1.12, which Responses (without attachments) are attached as Exhibit B to this Response; *see also* RESA/IGS Energy Motion to Strike Portions of the Direct and Rebuttal Testimony and Exhibits of Martin Cohen at 2-4.)

At the same time, although CUB/AG have provided some background documentation regarding the CUB Market Monitor, it is completely unclear whether that information is credible or whether Mr. Cohen, as the only CUB/AG witness in this proceeding, can vouch for the accuracy of that information. On the one hand, given Mr. Cohen's invocation of the CUB Market Monitor as CUB/AG's only witness, it would appear that he *must* have personal knowledge of the details

supporting the CUB Market Monitor (or else his testimony should plainly be stricken). On the other hand, the CUB/AG Data Request Responses make attempts to distance Mr. Cohen from the CUB Market Monitor. (*See id.*)

A deposition will provide an efficient forum, without using Commission resources, to get to the bottom of this issue, and to allow for the fair acquisition of information to allow for a meaningful and informed inquiry into the CUB Market Monitor at the Evidentiary Hearing and in subsequent filings.

The CUB/AG Motion to Quash Fails to Justify Preventing the Deposition

The CUB/AG Motion to Quash advances a number of arguments to attempt to deny RESA/IGS Energy the right to depose Mr. Cohen in accordance with the Act and the Commission's Rules of Practice. None of those arguments stand up to scrutiny.

As an initial matter, the CUB/AG Motion repeatedly alleges that the Notice of Deposition failed to state whether the deposition is to be a "discovery" deposition or an "evidence" deposition. (*See* CUB/AG Motion to Quash at ¶¶ 11, 15.) This allegation, though of no legal significance, seems intended as a rhetorical device designed to indicate a procedural irregularity with the Notice of Deposition. However, the allegation is false. The Notice of Deposition plainly states that it is a discovery deposition:

PLEASE TAKE NOTICE that on May 3, 2013 at 9:00 a.m., counsel for Interstate Gas Supply of Illinois, Inc. and the Retail Energy Supply Association shall take the deposition of Citizens Utility Board/People of the State of Illinois witness Martin R. Cohen **for discovery purposes...**

(Notice of Deposition of Mr. Cohen, *see* Exhibit A to this Response) (emphasis added).

The CUB/AG Motion to Quash then notes that "a discovery deposition is to explore the facts of the case by obtaining information, committing witnesses to particular stories, and obtaining admissions from opposing parties." (CUB/AG Motion to Quash at ¶ 12, citing *Slatten v. City of*

Chicago, 12 Ill App. 3d 808, 813 (1st Dist. 1973).) RESA/IGS Energy could not agree more with that proposition. As discussed above, the deposition of Mr. Cohen will provide an appropriate forum "to explore facts" about Mr. Cohen's knowledge of the CUB Market Monitor and competitive markets generally; will "commit" him to a position (i.e., a "particular stor[y]"), which will expedite matters at the Evidentiary Hearing; and will potentially result in "admissions," which will be an important factor for the Administrative Law Judge and the Commission in evaluating the credibility of the position advocated by CUB/AG. (*See also* Sup. Ct. R. 212(a) "Use of Depositions".) All of the factors identified in *Slatten* actually **support** proceeding with Mr. Cohen's deposition.

Similarly, all these factors rebut the CUB/AG reference to Section 200.340 of the Commission's Rules of Practice. (*See* CUB/AG Motion to Quash at ¶ 9.) Section 200.340 is by no means a categorical rejection of depositions in Commission proceedings. That section cautions against harassment, delay, and disruption caused by a deposition -- none of those circumstances apply here. The taking of Mr. Cohen's deposition ought to result in a more efficient Evidentiary Hearing process, and the CUB/AG Motion does not seriously suggest otherwise.

The CUB/AG Motion to Quash then generically cites Supreme Court Rule 201 for the proposition that Illinois courts "discourage duplication of discovery methods to obtain the same information." (CUB/AG Motion to Quash at ¶ 13.) CUB/AG's citation of Rule 201 is ironic. It is common knowledge that in virtually every piece of civil litigation that gets to the discovery stage in Illinois courts, *both written discovery and oral depositions are used* concurrently. Rule 201 in no way prevents that. On the contrary, the official Committee Comments appended to Rule 201 note that the 1995 revisions to the rule "discarded a provision requiring leave of court before a party could request by one discovery method information already obtained through another" because "[t]he committee concluded that there are circumstances in which it is justifiable to require answers

to the same or related questions by different types of discovery procedures..." (Sup. Ct. R. 201, Committee Comments on ¶ (a).) On the contrary, other parts of Rule 201 that the AG/CUB Motion to Quash omit speak about the *expansive* nature of the discovery process:

(a) Discovery Methods. Information is obtainable as provided in these rules through **any** of the following discovery methods...

(1) ***Full Discovery Required.*** Except as provided in these rules, a party may obtain by discovery full disclosure **regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense...**

(Sup. Ct. R. 201(a), (b)) (emphasis added). Illinois case law confirms that those rule provisions endorse "liberal pretrial discovery." (*Winfrey v. Chicago Park Dist.*, 274 Ill App. 3d 939, 949, 654 N.E.2d 508, 516 (1st Dist. 1995).) Thus, Rule 201 in no way precludes Mr. Cohen's deposition.

The CUB/AG Motion to Quash goes on to allege that Mr. Cohen's deposition should be precluded on the basis that it might result in discovery of "the same information." (CUB/AG Motion to Quash at ¶ 14.) This baseless speculation regarding the scope of the deposition is just a variation of the Rule 201 argument discussed above, and it provides no justification to prevent Mr. Cohen's deposition.

The CUB/AG Motion then alleges that the discovery deposition of Mr. Cohen is "wholly unnecessary" because Commission administrative procedure already provides for other avenues for discovery of information. (CUB/AG Motion to Quash at ¶ 15.) Nothing in the Commission's Rules of Practice or the Act suggests that parties are limited to a single discovery method in order to develop a complete record. To the contrary, as discussed in the Introduction to this Response, that argument is rebutted by the plain language of the Act and the Commission's identical Rules of Practice, both of which explicitly provide for the use of depositions as a discovery tool available to

parties, even without a subpoena or other permission from the Commission. (220 ILCS 5/10-106; 83 Ill. Admin. Code 200.360(a).)

The CUB/AG Motion then alleges that RESA/IGS Energy's "due process rights would not be violated" by precluding Mr. Cohen's deposition since they will be able to make "any inquiry of Mr. Cohen that could be made in the deposition at the evidentiary hearing." (CUB/AG Motion to Quash at ¶ 16.) That allegation is plainly incorrect. Supreme Court Rule 206(c)(1) provides that a deponent in a discovery deposition "may be examined regarding any matter subject to discovery under these rules." Thus, at a discovery deposition, the deponent may be asked and must answer any number of questions that would be objectionable in an Evidentiary Hearing. In other words, **the Rules of Evidence do not apply to a discovery deposition.** As stated by the Illinois Supreme Court:

The purpose of a discovery deposition is to explore the facts of the case, and for this reason wide latitude is given in the scope and manner of questioning. In contrast, an evidentiary deposition is generally used for the purpose of preserving testimony for trial, and questioning is therefore limited by the rules of evidence.

(*In re Estate of Rennick*, 181 Ill. 2d 395, 401 (1998); *see also Marotta v. Ford Motor Co.*, 2008 WL 5539656 at *10 (Ill. Workers' Comp. Commission 2008) ("[I]n a discovery deposition, the rules of evidence would not apply.")) That is not the situation at a Commission Evidentiary Hearing, where, with limited exceptions, the Rules of Evidence do apply (*see* 83 Ill. Admin. Code 200.610(a), (b)), and where, as a practical matter, Administrative Law Judges and parties regularly use the Rules of Evidence as a guide to the limits of cross-examination and the admissibility of evidence into the record.

The CUB/AG Motion then alleges that CUB/AG's due process rights *would* be violated since Mr. Cohen's deposition is scheduled one business day before the commencement of the Evidentiary Hearing. (CUB/AG Motion to Quash at ¶ 16.) This objection is unconvincing. To the

extent that Mr. Cohen says anything that is surprising to CUB/AG, deposition transcripts can be ordered for expedited delivery. If, for some unusual reason, some additional time is needed between Mr. Cohen's deposition and his cross-examination at the Evidentiary Hearing, arrangements could be made. One approach might be for CUB/AG to agree to schedule Mr. Cohen's deposition prior to May 3; another approach could be to postpone the cross-examination of Mr. Cohen for a few days, keeping the record open for that period after the conclusion of the scheduled Evidentiary Hearing, and then conducting his cross-examination once parties have had an opportunity to review the deposition transcript. Similar arrangements occur with respect to modifying schedules for cross-examination of witnesses at the Commission on a fairly regular basis.

Finally, the CUB/AG Motion alleges that allowing the deposition would "prejudice" CUB/AG and "frustrate administrative efficiency." (CUB/AG Motion to Quash at ¶ 17.) This argument is counterintuitive and counterfactual. Permitting the deposition to proceed as scheduled *would serve* administrative efficiency, by allowing the discovery, identification, and development of relevant information and at the same time providing for the potential for narrowing contested issues in a pre-Evidentiary Hearing forum, without involving the resources of the Administrative Law Judge or the Commission in any way. How that process could "prejudice" the CUB or the AG goes completely unexplained in the CUB/AG Motion to Quash.

Conclusion

For the reasons stated, RESA and IGS Energy respectfully request an expedited ruling denying the CUB/AG Motion to Quash the deposition of Mr. Cohen.