

**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

SANTANNA NATURAL GAS CORPORATION )  
d/b/a SANTANNA ENERGY SERVICES )  
Application for Certificate of Service Authority )      Docket No. 02-0441  
Under §19-110. )

**REPLY BRIEF ON EXCEPTIONS OF THE CITIZENS UTILITY BOARD**

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Pursuant to 83 Ill. Adm. Code 200.830, the Citizens Utility Board ("CUB") now files its Reply Brief on Exceptions in response to the initial briefs filed by the People of the State of Illinois ("AG"), the Staff of the Illinois Commerce Commission ("Staff"), and Santanna Natural Gas Corporation d/b/a Santanna Energy Services ("Santanna") in the above-captioned case. In support of the Reply Brief, CUB states as follows:

### **Introduction**

On October 10, 2002, the Administrative Law Judge ("ALJ") issued a Proposed Order recommending that the Commission deny Santanna's application for a certificate of service authority. In support of this conclusion, the ALJ determined that Santanna lacked sufficient managerial resources and abilities to serve as an alternative gas supplier.

Proposed Order, §V.

CUB generally concurred with the ALJ's well-reasoned decision and therefore filed no exceptions to the Proposed Order. Staff filed limited exceptions requesting that the order be amended to better emphasize the testimony of Staff's witness and Article 19 of the Public Utilities Act ("the Act"). *See generally*, Staff Brief on Exceptions ("BOE"). The Attorney General filed limited exceptions requesting that the order rely more heavily upon the Act than the Commission's rules. *See generally*, AG BOE. CUB supports the AG's proposed recommendations and takes no position regarding the arguments adduced by Staff's witness. CUB similarly agrees with both Staff and the AG's suggestion that the order rely more heavily upon the actual law as opposed to Part 551 of the Administrative Code.

In its Brief on Exceptions, Santanna erroneously argues that the Public Utilities Act contains a compliance grace period within which the company was permitted to

develop its marketing program and eventually upgrade its customer service protocol. Santanna BOE, pp. 2-9. This flawed premise forms the basis for the majority of Santanna's exceptions. Santanna BOE, pp. 5-9, 18-19, 25-26. Accordingly, CUB addresses this ill-conceived argument herein. Below, CUB also addresses Santanna's numerous contentions that the ALJ improperly considered record evidence and ultimately drew the wrong conclusion in recommending that the Commission deny the company's application. Further, CUB also responds to Santanna's mischaracterization of certain evidence as undisputed.

**I. The ALJ Properly Interpreted And Applied Section 19-110(b) of the Public Utilities Act**

Section 19-110(b) of the Act provides a 180-day grace period for existing alternative gas suppliers to obtain certification. As explained in CUB's Reply Brief, this grace period was a necessary component of the statute since the ICC-approved customer choice program pre-dated the statute's enactment. CUB Reply Brief, pp. 4-6; Proposed Order, ¶21.

As urged by CUB, Staff and the AG, the ALJ determined that Santanna's interpretation of the 180-day grace period provided in §19-110(b) of the Public Utilities Act was incorrect. Proposed Order, ¶21. As established in our Reply Brief, a plain reading of the statutory language clearly demonstrates that the words "this Section" pertain solely to Section 19-110 of the Act, which sets forth the requirements for certification of alternative gas suppliers. CUB Reply Brief, p. 4. Contrary to Santanna's assertions, the 180-day grace period does not constitute a "blanket exemption" from compliance with the Article *in toto*. Proposed Order, ¶21.

In its BOE, Santanna blankly asserts that the ALJ provides no authority for his reference to the rationale underlying the existence of the 180-day grace period. However, Santanna provides no authority for its contention that ¶3 of the order should be changed to reflect that the grace period was intended to apply to all sections of Article 19. Santanna BOE, p. 5.

As CUB, the AG and Staff demonstrated in Initial Briefs, the legislature identified the specific section to which the grace period applies. CUB Reply Brief, pp. 4-5; AG Reply Brief, pp. 2-4; Staff Reply Brief, 1-3. There is nothing in the statute that indicates otherwise. Indeed, where the General Assembly has intended that a phrase apply to all sections of an article, it has expressly stated this intention. For example, §§19-100 and 19-105 and 13-101 explicitly refer to "this Article." 220 ILCS 5/13-101, 19-100, 19-105. While §19-110(b) expressly provides suppliers whose participation in the market pre-dates the law, 180 days to comply with "**this Section**". 220 ILCS 5/19-110(b). (Emphasis added). There can be no doubt that the General Assembly intended that an alternative gas supplier comply with the requirements of §19-110 within 180 days.

Santanna argues that §19-110(e)(4) imports §19-115 and thus the grace period applies to "every prerequisite to certification." Santanna BOE, pp. 7-8. Santanna's arguments miss the mark. Section 19-110 is divided into two distinct sets of requirements—one for the applicant and one for the Commission.

The compliance described in §19-110 (b)-(d) consists of a supplier: 1.) filing a verified application and publishing notice thereof; 2.) identifying the geographic area the supplier intends to serve; and 3.) obtaining a certificate of service authority. 220 ILCS

5/19-110(b)-(d). These items constitute the express prerequisites for an alternative gas supplier's application under the law.

Section 19-110(e)-(f) sets guidelines for the Commission to follow in evaluating a supplier's application for a certificate of service. 220 ILCS 5/19-110(e)-(f). Indeed, §19-110(e)(1)-(5) enumerates the findings that the Commission must make in order to grant a supplier's application.<sup>1</sup> Accordingly, Santanna's argument that §19-110(e)(4) imports §19-115 and therefore triggers the applicability of the grace period to §19-110, is baseless because this section does not pertain to supplier prerequisites, but Commission responsibilities. Absolutely nothing in Article XIX supports Santanna's position. Indeed the express language of §19-110 contradicts the company's logic.

Santanna also falsely argues (without authority or citation to the record) that it complied with the prerequisites of §19-115 for 180 days after the enactment of Article 19. Santanna BOE, p. 8. The evidence in the record, as well as Santanna's own admissions, flatly contradict this contention.<sup>2</sup>

Santanna's exceptions 1-4, 9 and 13 are based upon the company's flawed grace period premise. Santanna BOE, pp. 5-9, 18, 25. For the reasons set forth above, the ALJ should reject any and all exceptions based thereon.

## **II. The ALJ Properly Considered Santanna's Pre and Post-Application Performance, And Its Preparation For Entry Into The Residential Market**

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<sup>1</sup> It is worth noting that §19-110(e) specifically references the findings set forth in "this subsection," meaning the findings enumerated in items 1-4. This again supports the interpretation of the 180-day grace period urged by CUB, the AG, the Staff and the ALJ.

<sup>2</sup> See *inter alia*, AG Stipulated Ex. 1; CUB Ex. 3.0, CUB Cross Ex. 2 (008-010), CUB Cross Ex. 15

(SES ICC 001-007), Tr. 150-151; 209, 214, 217- 219, 222.

Section 19-110(e) provides that the Commission can only grant a certificate if it finds that the applicant (either in its application or in other materials submitted by the company) possesses sufficient managerial resources and abilities to provide the service for which it seeks a certificate of service authority. 220 ILCS 5/19-110(e). Moreover, in reaching that determination, §19-110(e)(1) mandates that the Commission consider "the characteristics, including the size and financial sophistication of the customers that the applicant seeks to serve." 220 ILCS 5/19-110(e)(1). Finally, the Commission must find "that the applicant will comply with all other applicable laws and rules." 220 ILCS 5/19-110(e)(5).

The record reflects that Santanna failed to adequately disclose the terms, prices and conditions of service to its prospective customers as required by §19-115 of the Act. 220 ILCS 5/19-115. *See* CUB Initial Brief, p. 4-13; AG Initial Brief, p. 30-36. Given the novelty of customer choice and Santanna's avant garde service offering, customers had no reason to believe that they would be billed in any manner other than the one to which they had grown accustomed with their incumbent supplier.

The record also reflects that Santanna representatives posed as NICOR employees in order to obtain customers on Santanna's behalf. CUB Initial Brief, pp. 19-21; AG Initial Brief, pp. 19-21. Santanna argues that these acts were limited to a few bad apples, however the company has not offered an explanation as to how its different agents (hailing from different parts of the country) arrived in Illinois and employed the same illegal tactics to obtain customers for Santanna's benefit. CUB Initial Brief, p. 20; Proposed Order, ¶61. By switching customers without their authorization, failing to

disclose material terms and conditions and failing to adequately oversee its sales force,<sup>3</sup> Santanna demonstrated that it has not complied with applicable Illinois law.

The company's failure to not only ascertain, but also to meet its legal responsibilities in this state constitutes an inadequacy in its managerial abilities. Accordingly, the ALJ properly considered the company's preparation for entry into the Illinois market. Since Santanna did not fully inform itself of its legal obligations, it cannot be expected to fully comply with all relevant laws and rules.

The company contends that the ALJ's finding that the Commission is compelled to consider the company's performance in Illinois to date is contrary to Illinois law. However, Santanna provides no legal basis for this proposition. Instead Santanna solely relies upon Part 551, the administrative rules enacted to implement the Article XIX. This strategy ignores the mandates of Article XIX. Although the Commission's rules are important, they are secondary to the statutes from which they are derived.

To follow Santanna's suggestion and ignore the company's performance in the Illinois residential market would constitute a violation of the Act. The ALJ is compelled to consider Santanna's willingness to comply with state law. Direct evidence of this compliance can be gleaned from Santanna's compliance to date. Additionally, Santanna's theory that its past performance would not have been considered had it applied for a license on the day on which the statute was enacted is erroneous. Santanna BOE, p. 10. The volume and scope of customer complaints received to date would have constituted grounds for revocation, modification or suspension of a certificate of service

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<sup>3</sup> Santanna argues that the ALJ improperly considered its use of multiple and differing contracts and its failure to keep track of the terms by which it was bound to individual customers. This is relevant to Santanna's managerial abilities with respect to the adequate supervision of its sales force. *See* CUB Initial Brief, pp. 17-19; CUB Cross Ex. 15 (SES ICC 001-007); CUB Cross Ex. 16 (SES ICC 221-251); CUB Cross Ex. 18 (SES ICC 290-297).

authority pursuant to §19-120 had Santanna already possessed one. 220 ILCS 5/19-120(c). Santanna's argument that a certificate should not be denied on the basis of these very complaints is unjustifiable.

Santanna's interpretation of the Act suggests that the Commission must simply rubber stamp applications instead of engaging in a substantive review of the applicant's ability to serve Illinois consumers. This simply cannot be what the General Assembly contemplated when enacting Article XIX.

**A. Denial of Santanna's Request For a Certificate of Service Authority Does Not Trigger The Equal Protection Clause**

In a last ditch effort to overcome the record, Santanna outrageously argues that the "ALJ's approach raises an equal protection clause issue." Santanna BOE, p. 10. The company contends that it is being treated differently than similarly situated alternative gas suppliers. However there is no factual evidence to support this contention.

The ALJ's rejection of Santanna's certification request is consistent with Commission treatment of applicants with poor service records. Recently, in ICC Docket No. 00-0732, an ALJ recommended denial of a certificate of service authority to a company with 196 customer complaints in Illinois and nearly 13,000 complaints in other states. *See* ICC Docket No. 00-0732 Memorandum of ALJ, June 27, 2002.<sup>4</sup> In the instant case, Santanna's marketing tactics, poor service quality and misleading marketing materials formed the basis of nearly 2,000 complaints to the Illinois Attorney General, the Illinois Commerce Commission, the Better Business Bureau, and the Citizens Utility Board. AG Initial Brief, p.10, CUB Initial Brief, p. 2; CUB Reply Brief, p. 11; Staff Reply Brief, pp. 3-4; Proposed Order, ¶31. Indeed Santanna's own records reflect more

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<sup>4</sup> Ultimately, Talk America withdrew its application rather than face official denial of its application.

than 5,500 complaints and nearly 14,000 customers terminated service. AG Stipulated Ex. 1; Santanna Ex. 1.0, pp. 4, 20; CUB Initial Brief, p. 2; Proposed Order, ¶ 31. Staff witness Joan Howard noted that complaints regarding Santanna comprised the majority (77%) of all gas supplier complaints over the relevant period. Staff Ex. 1.00, p. 6. CUB witness David Kolata noted that complaints regarding Santanna rivaled the number of complaints regarding Ameritech at the height of its well-known service quality deficiencies. CUB Ex. 1.0, p. 6. No other alternative gas suppliers yielded the same volume or scope of complaints as Santanna during its participation in the residential market.

The Commission need only demonstrate a rational relationship to a legitimate purpose in denying Santanna's application in order to defend its decision and overcome Santanna's allegation of equal protection violations. *Illinois-American Water Company v. Illinois Commerce Commission*, 322 Ill. App. 3d 365, 370, 751 N. E. 2d 48, 53 (3<sup>rd</sup> Dist. 2001). In the case at bar, the denial of Santanna's request for a certificate of service authority bears a direct and rational relationship to the Commission's legitimate interest in protecting consumers from bad actors in an emerging marketplace. Moreover, only the existence of a fundamental right will trigger the right to equal protection under the Illinois Constitution. In the case at bar, there is no fundamental right in question.

In support of its claim to equal protection, Santanna relies upon *Smith v. Severn*.<sup>5</sup> However, the *Smith* court held that "an equal protection violation occurs only when different legal standards are arbitrarily applied to similarly situated individuals." *Id.* at 429 (citing *Del Vecchio v. Illinois Dept. of Corrections*, 31 F. 3d 1363, 1386 (7<sup>th</sup> Cir. 1994)). Also, the court noted that "in determining which rights are fundamental, the task

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<sup>5</sup> 129 F. 3d 419 (7<sup>th</sup> Cir. 1997).

is to determine whether the claimed right is 'explicitly or implicitly, guaranteed by the Constitution.'" *Id.* at 429 (citing *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33-34, 36 L.Ed. 2d 16, 93 S. Ct. 1278 (1973)).

In the case at bar, Santanna has neither asserted nor proven that a certificate of service authority is a fundamental right. To be sure, the fact that a company must not only apply for it, but also meet specific criteria in order to obtain it, suggests that the certificate is a privilege not a right. Moreover, as demonstrated above, Santanna's treatment is consistent with that of other applicants with numerous customer complaints. Thus, Santanna's argument must necessarily fail.

**B. Rejection of Santanna's Application Does Not Constitute A Takings Under the Fifth Amendment**

In yet another effort to defeat the ALJ's recommendation, Santanna relies upon Colorado and Rhode Island cases (which have no precedential value in this forum) in support of its contention that denial of a certificate in this case would constitute an improper taking under the Fifth Amendment of the U.S. Constitution.

The Colorado case, *Poudre Valley Rural Electric Association, Inc. v. City of Loveland*,<sup>6</sup> does not support Santanna's position. Indeed, the case does not stand for the proposition that Santanna cited. Santanna BOE, p. 10, fn 15. Instead, *Poudre Valley* stands for the proposition that when a municipality annexes a cooperative's service territory, the municipality must compensate the cooperative whether the city has a present use for the area or not. *Id.* at 556. Moreover, in that case, the municipality and the electric cooperative had a contractual agreement and a statute that governed the terms of their agreement. The instant case is wholly inapposite to that relied upon by Santanna.

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<sup>6</sup> 807 P. 2d 547 (Colo. 1991)

Here, there is no agreement between Santanna and any of the municipalities whose residents might be affected by the rejection of Santanna's application. Further, Santanna has no established right in a certificate that has not been granted to it. The granting of a certificate is a privilege not a right or legal entitlement.

Santanna's reliance upon *Pitocco v. Harrington*, 707 A.2d 692 (R.I. 1998) is similarly misplaced. Not only does the case lack precedential value, but also, in *Pitocco* the court held that where homeowners' permit had been unilaterally adjudicated without benefit of a hearing, the city official acted arbitrarily and in violation of 42 U.S.C. §1983. *Id.* at 692, 696. This is irrelevant to the case at bar since Santanna was indeed granted a hearing on the merits of its application and the ALJ's proposed order is consistent with the mandates of Article XIX. Santanna was afforded the opportunity to adduce evidence of its qualifications and managerial resources and abilities. Moreover, the company was able to cross-examine witnesses opposed to its certification. In the face of both factual and legal support for his conclusion, Santanna cannot now argue that the ALJ's decision was a unilateral one.

**C. The ALJ's Evidentiary Findings Are Fully Supported By The Record**

The ALJ properly considered the thousands of customer complaints regarding Santanna. Proposed Order, ¶87. Santanna's contention that these complaints are irrelevant to Article XIX is unfounded and unsupported. Additionally, the company's claim that the record does not contain complaints subsequent to the initial stages of Santanna's program is simply untrue.

The record reflects complaints received as late as August 16,2002. See App. 1 and 2 of CUB Ex. 1.0. As Santanna is well aware, the evidentiary proceedings were held

on August 28<sup>th</sup> and 29<sup>th</sup>. It is impossible for the record to reflect every complaint received to date since the record must close at some fixed point in time. Also, regardless of when the complaints were received they all fit the same pattern of allegations ranging from Santanna representatives posing as NICOR employees to customers being held to previously undisclosed terms and conditions of service. *See* Staff Ex. 1.0, p. 6; CUB Ex. 1.0; AG Ex. 1.0. Further, Santanna itself admits that these things did in fact occur, and that the company is **not** operating under the assumption that the consumer complaints are false. Tr. 191; CUB Ex. 2.0, App. 1 (SES ICC 192); Proposed Order, ¶87. The company cannot now attempt to downplay its own admissions by finding fault with the ALJ's conclusions.

Despite its assertions to the contrary, Santanna did not disprove a single complaint on record. Santanna BOE, p. 20, fn 27. The record reflects that Santanna's efforts to disprove certain CUB complaints (hand-picked by Santanna, not vice versa as the transcript reflects) were unsuccessful. Santanna Redirect Ex. 1; Santanna Cross Exhibits 4-6. Indeed, the verification transcripts provided by Santanna simply served to prove that the company failed to adequately inform customers about its gas storage program and created confusion about the exact program in which the customers were enrolling. CUB Reply Brief, pp. 17-19; Tr. 424-427.

As stated in our Initial Brief, the record is replete with evidence that Santanna failed to adequately supervise its sales force. The company now disputes this by citing the rebuttal testimony of Santanna President, T. Wayne Gatlin. However, the company ignores the cross-examination of Mr. Gatlin as well as the many documents admitted into the record which wholly contradict Santanna's claim. *See* AG Initial Brief, pp. 16-24;

CUB Initial Brief, pp. 5-6; 19-23; CUB Cross Ex. 9 (SES ICC 206); CUB Cross Ex. 10 (SES ICC 165); Tr. 165-181. In fact, while Santanna had many opportunities to discipline its marketers and terminate service with them, the company failed to do so. *Id.* at Tr. 167-181.

### **III. Recommendations**

The Proposed Order should be amended to reflect the concerns of both Staff and the Attorney General. Santanna's recommended changes are fully contradicted and unsupported by the record and the mandates of Article XIX and should be ignored in their entirety.

If there is any flaw in the proposed order it is the order's failure to squarely identify the sections of Article XIX that expressly authorize the Commission to deny Santanna's certificate. CUB agrees with the AG and Staff that the ALJ mistakenly relied upon the administrative rule instead of the underlying statute. As noted above, Section 19-110(e) specifically authorizes the Commission to consider the characteristics, including the size and financial sophistication of the customer that the applicant seeks to serve. Unlike §551.100 of the administrative code, Article XIX of the Act does not explicitly state nor implicitly suggest that years of experience constitute a sufficient level of managerial resources and abilities.

Accordingly, CUB supports the changes suggested by the AG and Staff, or in the alternative CUB proposes the following:

1. Paragraph 24 of the Proposed Order should be amended to reflect the Commission's obligation to make a finding that the applicant will comply with all

applicable laws and rules. Therefore CUB recommends the inclusion of §19-110(e)(5) in ¶24.

(5) That the applicant will comply with all other applicable law and rules.

2. Paragraph 82 of the Proposed Order should be amended to reflect the Commission's reliance upon Article XIX.

Article 19 requires the Commission to certify an alternative gas supplier only if the Commission finds that the applicant possesses "sufficient managerial resources and abilities" and that "the applicant will comply with all other applicable laws and rules." 220 ILCS 5/19-110(e)(1) and (5). ~~At the outset,~~ ~~The Commission acknowledges that Section 551.100 specifies that an applicant "shall" be deemed to possess sufficient managerial capabilities if it has two or more individuals in management positions with prescribed types and years of experience and provides certain information regarding those individuals. The Commission also acknowledges that Santanna represents that it has in its employ managers meeting the prescribed standards and has provided the requisite information. In a situation such as this, however, Article 19, the statutory mandate, governs. In accordance with this Article, where the Commission has had the benefit of observing an applicant's ability to implement purported managerial capabilities, the Commission is compelled to consider the applicant's ability (or inability) to successfully implement those capabilities. Further,~~ ~~The Commission's statutory duty to protect the public welfare in matters related to State-regulated utility service requires that the Commission use this rare opportunity and review Santanna's actual experiences providing residential gas service and its ability to implement the management skills it purports to possess.~~

3. CUB notes that Santanna's recommendation that it be permitted to keep its customers until March 2003 is untenable. Santanna BOE, p. 31. Indeed the Commission should amend Paragraph 92 to require Santanna to immediately cease and desist all marketing, door-to-door solicitations or any other efforts to enroll new customers.

Towards that end, CUB suggests the following:

(8) Santanna should immediately cease and desist all marketing, door-to-door solicitations or any other efforts to enroll new customers.

## V. Conclusion

The ALJ reached the proper conclusion in denying Santanna's request for a certificate of service authority. It is counterintuitive that the General Assembly intended that the Commission issue a certificate to a gas supplier that is found to be in violation of its service obligations under §19-115 when those very same violations could or would have resulted in de-certification had the provider been previously certified.

Respectfully submitted,

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