

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

)	
<i>In the Matter of :</i>)	
)	
Nicor Gas)	Docket No. TSCA-HQ-2015-5017
1844 Ferry Road)	
Naperville, Illinois 60563)	
)	
)	
Respondent.)	
)	
)	

RESPONDENT’S PREHEARING EXCHANGE

Respondent Nicor Gas (“Nicor”) respectfully submits this Respondent’s Prehearing Exchange pursuant to the Prehearing Order dated April 18, 2016, the Order on Joint Motion for Extension of Time dated May 20, 2016, and 22 C.F.R. § 22.19.

1(A): Witnesses Intended To Be Called At Hearing

1. Richard J. Tappan: Mr. Tappan will testify as a fact witness. Mr. Tappan, a Licensed Professional Engineer, worked at Nicor from approximately 1974 through approximately 2004. Mr. Tappan was the manager of Nicor’s environmental affairs from approximately 1994 through approximately 2003. Within Nicor, Mr. Tappan was the person primarily responsible for PCBs and TSCA compliance issues for the company from 1994 through 2003.

Mr. Tappan will testify regarding Nicor’s historic evaluation of potential sources of PCBs in its system; his role on behalf of Nicor with the American Gas Association (“AGA”) and other industry groups with respect to the rulemaking for what became known as the PCB Mega Rule in 1998 (40 C.F.R. Part 761), including discussions and meetings with the AGA and EPA

representatives regarding the applicability of the Mega Rule to the natural gas distribution industry; applicability of the Mega Rule to the presence of PCBs in natural gas pipeline systems, including the scope of the regulatory requirements and the authorization to rely on historic activities and data; the evaluation of the origin of PCBs that had entered Nicor's system and the conclusion that the most likely source of the PCBs in Nicor's system was the company's natural gas suppliers, several of which had been part of EPA's Compliance Monitoring Program established for natural gas transmission companies that had PCB contamination greater than 50 ppm in their transmission lines; the role and work of Nicor's "PCB Implementation Committee" to ensure the company's compliance with the Mega Rule; and other issues relating to PCBs.

2. Keith Bodger: Mr. Bodger will testify as a fact witness. Mr. Bodger is presently Nicor's Senior Environmental Professional and has been with Nicor since 2001. Since 2002, Mr. Bodger has been one of the persons responsible for implementing Nicor's PCB management program, including training field crews, training on liquids inspection and sample collection methods, communications with laboratory personnel regarding PCB analysis, and all other related matters.

Mr. Bodger will testify regarding Nicor's PCB management program, including liquids inspection and sample collection, laboratory analysis, and recordkeeping; the findings in 2007 regarding liquids containing PCBs in certain customer meters; Nicor's PCB investigation in 2007 and 2008; Nicor's cooperation and interaction with EPA, the Illinois Environmental Protection Agency ("IEPA"), the Illinois Attorney General's Office, and local authorities in connection with the PCB investigation; Nicor's installation of drips in certain locations to collect liquids and Nicor's inspections of those drips; sampling of compressors on Nicor's natural gas system for the potential presence of PCBs; Nicor's analysis of whether its system contains potential sources of

PCBs; Nicor's filter-separator maintenance protocols and practices; the January 2013 collection of samples by IEPA at the request of EPA from certain equipment at Nicor's Hudson storage facility; and other issues relating to PCBs.

3. Somali Tomczak: Ms. Tomczak will testify as a fact witness. From January 2007 to 2014, Ms. Tomczak was Nicor's Manager and then subsequently Director of Environmental Services. In that role, Ms. Tomczak was one of the persons responsible for Nicor's environmental compliance, including compliance with PCB regulations.

Ms. Tomczak will testify regarding Nicor's PCB management program, including liquids inspection and sample collection, laboratory analysis, and recordkeeping; the findings in 2007 regarding liquids containing PCBs in certain customer meters; Nicor's PCB investigation in 2007 and 2008; Nicor's cooperation and interaction with EPA, IEPA, the Illinois Attorney General's Office, and local authorities in connection with the PCB investigation; Nicor's installation of drips in certain locations to collect liquids and Nicor's inspections of those drips; sampling of compressors on Nicor's natural gas system for the potential presence of PCBs; Nicor's analysis of whether its system contains potential sources of PCBs; Nicor's filter-separator maintenance protocols and practices; the January 2013 collection of samples by IEPA at the request of EPA from certain equipment at Nicor's Hudson storage facility; and other issues relating to PCBs.

4. Jim Jerozal: Mr. Jerozal will testify as a fact witness. From 2002 to March 2010, Mr. Jerozal was Nicor's General Manager of EHS. In that role, Mr. Jerozal was one of the persons responsible for Nicor's environmental compliance, including compliance with PCB regulations and communications with EPA and state and local authorities.

Mr. Jerozal will testify regarding Nicor's PCB management program, including liquids inspection and sample collection, laboratory analysis, and recordkeeping; the findings in 2007

regarding liquids containing PCBs in certain customer meters; Nicor's voluntary disclosure to EPA of such findings; Nicor's PCB investigation in 2007 and 2008; Nicor's cooperation and interaction with EPA, IEPA, the Illinois Attorney General's Office, and local authorities in connection with the PCB investigation; Nicor's installation of drips in certain locations to collect liquids and Nicor's inspections of those drips; Nicor's analysis of whether its system contains potential sources of PCBs; and other issues relating to PCBs.

5. Joe Deters: Mr. Deters will testify as a fact witness. Mr. Deters is Nicor's Managing Director of Storage and Peaking and has worked in the storage area for approximately 30 years. During this time, Mr. Deters has been one of the persons responsible for the operation and management of Nicor's natural gas storage facilities in Illinois.

Mr. Deters will testify regarding Nicor's natural gas storage facilities in Illinois, including Nicor's filter-separator maintenance protocols and practices; manufacturer recommended maintenance protocols for Nicor's filter-separators; the January 2013 collection of samples by IEPA at the request of EPA from certain equipment at Nicor's Hudson storage facility; Nicor's analysis of whether its system contains potential sources of PCBs; and other issues relating to PCBs.

6. Michael Partee: Mr. Partee will testify as a fact witness. Mr. Partee is Nicor's Senior Environmental Counsel and has been with Nicor for approximately 10 years.

Mr. Partee will testify regarding Nicor's PCB investigation in 2007 and 2008; Nicor's cooperation and interaction with EPA, IEPA, the Illinois Attorney General's Office, and local authorities in connection with the PCB investigation; the interconnects between Nicor and its suppliers through which the suppliers connect their transmission lines to Nicor's distribution

system, including ownership and control of the interconnect equipment, with reference to the company's interconnect agreements and industry practices; and other issues relating to PCBs.

7. Kathy Hopkins: Ms. Hopkins will testify as a fact witness. Ms. Hopkins is presently Nicor's Senior Administrator for Pipeline Transportation and has been with Nicor for over 15 years.

Ms. Hopkins will testify regarding the interconnects between Nicor and its suppliers through which the suppliers connect their transmission lines to Nicor's distribution system, including ownership and control of the interconnect equipment, with reference to the company's interconnect agreements and industry practices, and other issues relating to PCBs.

8. Shirley Holmes: Ms. Holmes will testify as a fact witness. Ms. Holmes is presently Nicor's Director of Gas Supply and has been with Nicor for more than twenty years.

Ms. Holmes will testify regarding the interconnects between Nicor and its suppliers through which the suppliers connect their transmission lines to Nicor's distribution system, including ownership and control of the interconnect equipment, with reference to the company's interconnect agreements and industry practices, and other issues relating to PCBs.

9. Gary Bartlett: Mr. Bartlett will testify as a fact witness. Mr. Bartlett is formerly Vice President of Nicor's storage operations.

Mr. Bartlett will testify regarding the interconnects between Nicor and its suppliers through which the suppliers connect their transmission lines to Nicor's distribution system, including ownership and control of the interconnect equipment, with reference to the company's interconnect agreements and industry practices, and other issues relating to PCBs.

10. Nancy Huston: Ms. Huston will testify as a fact witness. Ms. Huston was formerly Nicor's Manager of Environmental, Health and Safety.

Ms. Huston will testify regarding Nicor's PCB management program; Nicor's PCB investigation in 2007 and 2008; and Nicor's cooperation and interaction with EPA, IEPA, the Illinois Attorney General's Office, and local authorities in connection with the PCB investigation; and other issues relating to PCBs.

11. Hans Bell: Mr. Bell will testify as a fact witness. During the relevant timeframe, Mr. Bell was Nicor's Managing Director of Engineering in charge of areas such as system planning, design, and flow direction.

Mr. Bell will testify regarding Nicor's investigation of liquids in its system and Nicor's cooperation and interaction with EPA, IEPA, the Illinois Attorney General's Office, and local authorities in connection with the PCB investigation, and other issues relating to PCBs.

12. Dan Fox: Mr. Fox will testify as a fact witness. Mr. Fox is Nicor's Managing Director, Engineering. Mr. Fox has worked in Nicor's Engineering Department for over 35 years and has been involved in areas such as system planning and design.

Mr. Fox will testify regarding Nicor's investigation of liquids in its system and Nicor's cooperation and interaction with EPA, IEPA, the Illinois Attorney General's Office, and local authorities in connection with the PCB investigation, and other issues related to PCBs.

13. Gary Stercay: Mr. Stercay will testify as a fact witness. Mr. Stercay is Managing Director of System Operations for Nicor. Mr. Stercay has been with Nicor for approximately 30 years.

Mr. Stercay will testify regarding Nicor's maintenance program for certain gas delivery equipment and other issues related to PCBs.

14. Doug Gibbs: Mr. Gibbs will testify as a fact witness. During the relevant timeframe, Mr. Gibbs worked in information technology at Nicor.

Mr. Gibbs will testify regarding Nicor's investigation of liquids in its system and Nicor's cooperation and interaction with EPA, IEPA, the Illinois Attorney General's Office, and local authorities in connection with the PCB investigation, and other issues related to PCBs.

15. Jim Kuchler: Mr. Kuchler will testify as a fact witness. Mr. Kuchler is Nicor's Regional Director of Field Operations, Western Region. During the 2007-2008 timeframe, Mr. Kuchler managed Nicor's Park Ridge office and supervised field personnel in the vicinity.

Mr. Kuchler will testify regarding Nicor's field work for the PCB investigation, Nicor's installation of drips in the Park Ridge area, and other issues relating to PCBs.

16. Renee Cipriano: Ms. Cipriano will testify as a fact witness. Ms. Cipriano is an attorney at the law firm Schiff Hardin. She is former Director of the IEPA and Assistant Attorney General in the Environmental Control Division of the Illinois Attorney General. Ms. Cipriano represented Nicor in 2007 in connection with the findings of PCBs in liquids in certain customer meters. Ms. Cipriano also represented Ameren Corporation ("Ameren") in the 2007 timeframe with respect to PCBs in Ameren's natural gas system.

Ms. Cipriano will testify regarding Nicor's findings in 2007 regarding liquids containing PCBs in certain customer meters; Nicor's PCB investigation; Nicor's cooperation and interaction with EPA, IEPA, the Illinois Attorney General's Office, and local authorities in connection with the PCB investigation; and other issues relating to PCBs.

17. John Woodyard, PE, QEP: Mr. Woodyard will testify as both an expert witness and fact witness. Mr. Woodyard has a degree as a Master of Science in Mechanical Engineering (1976) and Bachelor of Science in Industrial Engineering (1974), both from the University of Illinois in Urbana/Champaign. He is a Registered Professional Engineer in California, Colorado, and Kansas. Mr. Woodyard is currently a consultant specializing in PCB management regulation

and practice. His involvement with PCB management and remedial issues dates back to the development of the EPRI PCB Manual in 1978, and his involvement with PCB rulemakings dates back to 1981. He has served as a consultant to Nicor and other natural gas distribution and transmission companies since 1983. He has served as a consultant to the AGA, the Interstate Natural Gas Association of America (“INGAA”), the Gas Technology Institute (“GTI”), and the Utility Solid Waste Activities Group (“USWAG”), and he managed the seven-year (1988-1995) \$3.5 million Gas Research Institute investigation into the behavior of PCBs in natural gas systems. Attached as RX4 is Mr. Woodyard’s curriculum vitae.

Mr. Woodyard will testify as an expert regarding the nature of PCBs; PCB fingerprinting; the history of PCBs in natural gas pipeline systems; the behavior of PCBs in natural gas pipeline systems; and the operational differences in the natural gas industry between interstate transmission systems and local distribution systems with respect to the history of PCBs and PCB management.

Mr. Woodyard will testify as a fact witness regarding the discovery of PCBs in interstate natural gas transmission systems; EPA’s Compliance Monitoring Program in the 1980s and 1990s; the development of the PCB Mega Rule as it applies to natural gas pipeline systems; and the involvement of the AGA and other trade associations in the development of the PCB Mega Rule and subsequent EPA guidance.

Mr. Woodyard will testify as both a fact and expert witness regarding the application of the PCB Mega Rule to the natural gas distribution industry; the meaning of “potential sources” in the PCB Mega Rule; natural gas industry standards for complying with the PCB Mega Rule; EPA’s paint filter test to distinguish liquid PCBs from non-liquid PCBs; the behavior of liquids that pass beyond customer meters into appliances; the degradation of PCBs when burned or

volatilized; the lack of exposure to PCBs (or dioxins or furans) from the presence of PCBs in liquids in natural gas pipeline systems and in customer equipment and piping; the presence of PCBs in buildings; Nicor's PCB management program, including liquids inspection and sample collection, laboratory analysis, and recordkeeping; Nicor's findings in 2007 regarding liquids containing PCBs in certain customer meters; Nicor's PCB investigation in 2007 and 2008; Nicor's cooperation and interaction with EPA, IEPA, the Illinois Attorney General's Office, and local authorities in connection with the PCB investigation; Nicor's installation of drips in certain locations to collect liquids and Nicor's inspections of those drips; sampling of compressors on Nicor's natural gas system for the potential presence of PCBs; Nicor's filter-separator maintenance protocols and practices; Nicor's analysis of whether its system contains potential sources of PCBs; EPA's efforts to amend the PCB Mega Rule with respect to natural gas pipeline systems, including the Advanced Notice of Proposed Rulemaking, 75 Fed. Reg. 17645 (Apr. 7, 2010); and the January 2013 collection of samples by IEPA at the request of EPA from certain equipment at Nicor's Hudson storage facility.

Nicor reserves the right to supplement this Prehearing Exchange with an expert report by Mr. Woodyard and additional documents after Nicor's review of any expert reports submitted by EPA.

18. John D. Schell, Ph.D.: Dr. Schell will testify as an expert witness. Dr. Schell holds a Ph.D. in Toxicology, University of Medicine and Dentistry of New Jersey, Rutgers University. Attached as RX7 is Dr. Schell's curriculum vitae.

Dr. Schell will testify regarding the health effects of exposure to PCBs, including any potential for exposure to PCBs in natural gas pipelines, PCBs in meters associated with natural gas systems, and PCBs that travel beyond meters into customer appliances; the degradation of

PCBs when burned or volatilized; the presence of PCBs in buildings; PCB risk assessments underlying the PCB Mega Rule; PCB risk assessments underlying EPA's Advanced Notice of Proposed Rulemaking, 75 Fed. Reg. 17645 (Apr. 7, 2010); and PCB risk assessments submitted to EPA in response to the Advanced Notice of Proposed Rulemaking, 75 Fed. Reg. 17645 (Apr. 7, 2010); and other issues relating to PCBs including in response to testimony by EPA witnesses.

Nicor reserves the right to supplement this Prehearing Exchange with an expert report by Dr. Schell and additional documents after Nicor's review of any expert reports submitted by EPA.

19. Pam Lacey: Ms. Lacey will testify as a fact witness. Ms. Lacey is Chief Regulatory Counsel for the AGA. The AGA represents more than 200 local natural gas distribution companies that deliver natural gas throughout the United States. Ms. Lacey has been involved in the development and application of the PCB Mega Rule to local natural gas distribution companies for many years.

Ms. Lacey will testify regarding the history of PCBs in natural gas pipeline systems; the behavior of PCBs in natural gas pipeline systems; the operational differences in the natural gas industry between interstate transmission systems and local distribution systems with respect to the history of PCBs and PCB management; the development of the PCB Mega Rule; the involvement of the AGA and other trade associations in the development of the PCB Mega Rule and EPA guidance; application of the PCB Mega Rule to the natural gas distribution industry; the meaning of "potential sources" in the PCB Mega Rule; natural gas industry standards for complying with the PCB Mega Rule; and EPA's efforts to amend the PCB Mega Rule with respect to natural gas pipeline systems, including the Advanced Notice of Proposed Rulemaking, 75 Fed. Reg. 17645 (Apr. 7, 2010).

20. Lori Traweek: Ms. Traweek will testify as a fact witness. Ms. Traweek is Senior Vice President and Chief Operating Officer of the AGA. Ms. Traweek was involved in the AGA's pipeline safety and environmental advocacy, including development and application of the PCB Mega Rule to local natural gas distribution companies.

Ms. Traweek will testify regarding the history of PCBs in natural gas pipeline systems; the behavior of PCBs in natural gas pipeline systems; the operational differences in the natural gas industry between interstate transmission systems and local distribution systems with respect to the history of PCBs and PCB management; the development of the PCB Mega Rule; the involvement of the AGA and other trade associations in the development of the PCB Mega Rule and EPA guidance; application of the PCB Mega Rule to the natural gas distribution industry; the meaning of "potential sources" in the PCB Mega Rule; and natural gas industry standards for complying with the PCB Mega Rule.

21. SET Environmental: A representative from SET Environmental will testify as a fact witness. SET Environmental was used by Nicor to conduct inspections and collect samples for Nicor's liquids and PCB investigation and to conduct remediation as needed. A representative from SET Environmental will testify regarding SET's inspections, sample collection, remediation activities, chain of custody, and document authentication.

22. STAT Analytical: A STAT Analytical representative will testify as a fact witness. STAT Analytical analyzes PCB samples collected as part of Nicor's PCB program. A representative from STAT Analytical will testify regarding laboratory data, chain of custody, and document authentication.

23. Microbac Laboratory: A Microbac Laboratory representative will testify as a fact witness. Microbac Laboratory analyzed PCB wipes samples collected as part of Nicor's PCB

program. A representative from Microbac Laboratory will testify regarding laboratory data, chain of custody, and document authentication.

24. Aires Consulting Group, Inc.: An Aires Consulting Group representative will testify as a fact witness. Aires Consulting Group conducted inspections and collected samples for Nicor's liquids and PCB investigation. A representative from Aires Consulting Group will testify regarding Aires's inspections, sample collection, chain of custody, and document authentication.

25. Peter Gimlin: Mr. Gimlin will testify as a fact witness. Nicor understands that Mr. Gimlin is an Environmental Protection Specialist, National Program Chemicals Division/ Office of Pollution Prevention and Toxics, EPA.

Nicor will ask Mr. Gimlin to testify regarding applicability of the PCB Mega Rule to natural gas pipeline systems, including the meaning of "potential sources"; EPA's efforts to amend the PCB Mega Rule with respect to natural gas pipeline systems, including the Advanced Notice of Proposed Rulemaking, 75 Fed. Reg. 17645 (Apr. 7, 2010); and any other enforcement actions by EPA of the PCB Mega Rule with respect to natural gas pipeline systems.

26. Sara McGurk: Ms. McGurk will testify as a fact witness. Nicor understands that Ms. McGurk works on Natural Gas Pipeline issues in the National Program Chemicals Division/ Office of Pollution Prevention and Toxics, EPA.

Nicor will ask Ms. McGurk to testify regarding the applicability of the PCB Mega Rule, including the meaning of "potential sources" and the obligations of owners and operators of natural gas pipeline systems where PCBs are introduced by upstream sources; and EPA's efforts to amend the PCB Mega Rule with respect to natural gas pipeline systems, including the Advanced Notice of Proposed Rulemaking, 75 Fed. Reg. 17645 (Apr. 7, 2010).

27. Lynn Vendinello: Ms. Vendinello will testify as a fact witness. Nicor understands that Ms. Vendinello was at one time EPA's Chief, Fibers and Organics Branch, National Program Chemicals Division.

Nicor will ask Ms. Vendinello to testify regarding the applicability of the PCB Mega Rule to natural gas pipeline systems, including the meaning of "potential sources"; and EPA's efforts to amend the PCB Mega Rule with respect to natural gas pipeline systems, including the Advanced Notice of Proposed Rulemaking, 75 Fed. Reg. 17645 (Apr. 7, 2010).

28. Mony Chabria: Mr. Chabria will testify as a fact witness. Nicor understands that Mr. Chabria is an attorney in EPA's Region 5, Office of Regional Counsel.

Nicor will ask Mr. Chabria to testify regarding Nicor's findings in 2007 regarding liquids containing PCBs in certain customer meters; Nicor's PCB investigation; and Nicor's cooperation and interaction with EPA, IEPA, the Illinois Attorney General's Office, and local authorities in connection with the PCB investigation.

29. Michael Calhoun: Mr. Calhoun will testify as a fact witness. Nicor understands that Mr. Calhoun is a former EPA employee (Environmental Scientist, Multimedia Enforcement Branch) who worked on EPA's Compliance Monitoring Program in the 1980s and 1990s.

Nicor will ask Mr. Calhoun to testify regarding the presence of PCBs in interstate transmission pipelines; EPA's Compliance Monitoring Program involving 13 interstate transmission companies whose systems contained PCBs; and other issues relating to PCBs.

30. Reservation: Nicor reserves the right to call witnesses called by EPA; to recall any of its witnesses in rebuttal; to supplement with expert reports; and to modify or supplement this list of witnesses prior to hearing, pursuant to 40 C.F.R. Part 22.

1(B): Documents and Exhibits Intended To Be Introduced Into Evidence

Copies of documents and exhibits that Nicor intends to introduce into evidence at the hearing are set forth on Attachment 1 and submitted electronically using the OALJ E-Filing System. Documents with business confidentiality claims have been submitted pursuant to 40 C.F.R. § 22.5(d)(2). Additionally, Nicor reserves the right to rely on any exhibits identified by EPA in its prehearing exchange or otherwise introduced by EPA and to modify or supplement this list of exhibits prior to hearing, pursuant to 40 C.F.R. Part 22. To the extent challenged by EPA, Nicor specifically reserves the right to supplement this list to address issues associated with interconnect agreements, sampling, chain of custody, and QA/QC, among other matters.

1(C): Place of Hearing, Amount of Time Needed To Present Direct Case, And Translation Services

As stated in the Status Report dated May 13, 2016, Nicor's preferred location for the hearing in this matter is Chicago, Illinois, based on that location's proximity to Nicor's headquarters in Naperville, Illinois, and its proximity to the majority of Nicor's witnesses. Additionally, eight of the nine witnesses identified in EPA's Initial Prehearing Exchange are also based in the Chicago area. Subject to cross-examination, Nicor estimates it will need approximately 3 days to present its case. Nicor does not request any translation services.

3(A): Documents In Support Of Denials Made In The Answer

Nicor refers to its Exhibit List attached as Attachment 1. Additionally, Nicor reserves the right to rely on any exhibits identified by EPA in its prehearing exchange or otherwise introduced by EPA and to modify or supplement this list.

3(B): Documents In Support Of Allegations In Respondent's Affirmative Defenses And Explanation Of Arguments In Support Of Affirmative Defenses

Nicor refers to its Exhibit List attached as Attachment 1. Additionally, Nicor reserves the right to rely on any exhibits identified by EPA in its prehearing exchange or otherwise introduced by EPA and to modify or supplement this list.

Nicor reserves the right to amend its Answer and Defenses with respect to the Complaint's allegations.

Nicor provides its explanation of arguments in support of its Defenses as follows without admitting that it bears any burden of proof:

1. 40 C.F.R. §§ 761.30(i)(1)(iii)(A)(2)&(3)—the basis for Counts I and II of the Complaint—do not apply to Nicor because Nicor's natural gas pipeline system does not include potential sources of introduction of PCBs \geq 50 ppm. *See* 40 C.F.R. § 761.30(i)(1)(iii)(B). To the contrary, Nicor established in the early 1980s—and submitted documentation to EPA—that its system does not include potential sources of PCBs \geq 50 ppm and that the most likely source of any PCB contamination is outside of Nicor's natural gas pipeline system, including from upstream suppliers of natural gas. *See, e.g.*, 63 Fed. Reg. 35383, 35396 (June 29, 1998) (explaining that a local natural gas distributor is exempt from characterization and analysis requirements if it has “document[ed] that the most likely source of PCB contamination was the natural gas pipeline that supplied [its] natural gas”); Highlights of Questions & EPA Answers,

AGA PCB Workshop (July 29, 1998) (“If PCBs are introduced upstream of the system, then the gas utility is not introducing PCBs in a source.”).

2. Even if 40 C.F.R. §§ 761.30(i)(1)(iii)(A)(2)&(3) applied to Nicor’s natural gas pipeline system (and they do not), Nicor complied by characterizing the extent of PCB contamination and analyzing all potential sources of PCBs in the early 1980s. *See, e.g.*, 40 C.F.R. § 761.30(i)(1)(iii)(E) (authorizing the use of historic data to fulfill the characterization and analysis requirements). Moreover, Nicor submitted characterization documentation to EPA at that time. Based on that characterization, Nicor has treated the Park Ridge area of its system as PCB-containing since the promulgation of the PCB Mega Rule and has complied with the applicable requirements of the rule. The rule imposes a one-time characterization and analysis requirement (e.g., “Within 120 days after discovery of PCBs \geq 50 ppm ... or by December 28, 1998, whichever is later”), and does not require re-characterization or re-analysis every time PCBs \geq 50 ppm are subsequently detected in Nicor’s system.

3. The analytical requirements in 40 C.F.R. § 761.1(b)(2)—first enacted in 1998—cannot apply retroactively to Nicor’s historic, pre-1998 data. 40 C.F.R. § 761.30(i)(1)(iii)(E) expressly authorizes the use of historic data to fulfill characterization and analysis requirements without subjecting historic data to 40 C.F.R. § 761.1(b)(2). Moreover, to retroactively impose new requirements on Nicor’s then-existing historic data would deprive Nicor of Due Process of law and Equal Protection of the laws as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, the Administrative Procedure Act, and TSCA.

4. EPA’s claims are barred, in whole or in part, because the legal theories advanced in the Complaint differ from EPA’s long-standing interpretation of TSCA and associated regulations and are arbitrary and capricious and do not comply with the requirements of the

Administrative Procedure Act. *See, e.g.*, 63 Fed. Reg. at 35396 (explaining that a local natural gas distributor is exempt from characterization and analysis requirements if it has “document[ed] that the most likely source of PCB contamination was the natural gas pipeline that supplied [its] natural gas”); Highlights of Questions & EPA Answers, AGA PCB Workshop (July 29, 1998) (“If PCBs are introduced upstream of the system, then the gas utility is not introducing PCBs in a source.”); EPA Response to Comments Document on the Proposed Rule – Disposal of PCBs OPPTS Docket #66009A (May 1998) (“if a distribution system does not contain any sources, the owner/operator of the system would need to document that the most likely source of PCB contamination was from the natural gas pipeline system that supplied their natural gas”).

5. EPA’s claims are barred, in whole or in part, because TSCA, implementing regulations and agency guidance did not provide and have not provided fair notice of the interpretations of law now advanced in the Complaint, including EPA’s new contentions that the list of potential sources in the rule is merely illustrative, that re-characterization of the entire system is required every time PCB-containing liquids are detected ≥ 50 ppm, and that the use of pre-Mega Rule historic data is subject to restrictions first promulgated in the Mega Rule. *See supra* ¶ 4. Accordingly, EPA’s efforts to enforce retroactively those new interpretations deprive Nicor of Due Process of law and Equal Protection of the laws as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, the Administrative Procedure Act, and TSCA.

6. EPA’s claims are barred, in whole or in part, because 40 C.F.R. § 761.30(i)(4) requires that a person characterizing PCB contamination do so by analyzing organic liquids collected at existing condensate collection points and Nicor’s actions complied with that requirement. In Count III of the Complaint, EPA improperly seeks to hold Nicor liable for

purportedly failing to repeat sampling and analysis where the original samples were not organic liquids and/or were not collected from existing condensate collection points. For example, samples taken from gas equipment such as regulators or meters were not taken from existing condensate collection points such as drips and many of those samples were not organic liquids. Further, for many of the samples at issue at customer locations, downstream equipment was found to be without liquids and/or without detection of PCBs. Regardless, some of the equipment at issue is subject to routine maintenance protocols which involve inspection for liquids and sampling of any liquids that are found.

Additionally, with respect to Count III, Nicor states that its ongoing investigation has disclosed that the regulator alleged to be associated with 610 S. Clifton is instead associated with 612 S. Clifton.

7. 40 C.F.R. § 761.30(i)(1)(iii)(A)(5)—the basis for Count III of the Complaint—does not apply to the extent that the PCBs allegedly detected in the four locations at issue in Count III (Compl. ¶¶ 41, 76) did not come from Nicor’s natural gas pipeline system and therefore are not subject to TSCA’s use authorization for PCBs in natural gas pipeline systems. Sampling and analysis of the PCBs detected at Lincoln Middle School, Evergreen Presbyterian Church, and Washington Elementary showed that PCBs detected outside of Nicor’s natural gas pipeline system were from sources other than Nicor’s gas system.

8. EPA’s claims are barred, in whole or in part, to the extent the PCBs at issue were detected in customer owned service lines or appliances or were otherwise found in natural gas pipeline systems not owned or operated by Nicor. Though end users are not excluded from the regulatory definition of “natural gas pipeline systems,” they are not subject to the requirements of 40 C.F.R. § 761.30(i). *See* Technical and Procedural Amendments to TSCA Regulations—

Disposal of Polychlorinated Biphenyls (PCBs), 64 Fed. Reg. 33755 (June 24, 1999). Nicor is responsible only for its own “natural gas pipeline system.” *See, e.g.*, 40 C.F.R. §§ 761.3, .30(i). Moreover, Nicor does not have access to or control of customer-owned equipment.

9. EPA’s claims are barred, in whole or in part, by the doctrine of selective enforcement. EPA has known since at least 1981 that PCBs are present within natural gas pipeline systems and that the sources of PCBs include historic lubricants and oils used by the natural gas transmission companies that sell gas to natural gas distributors like Nicor. *See, e.g.*, 75 Fed. Reg. 17645, 17657 (Apr. 7, 2010); 63 Fed. Reg. 35383, 35395 (June 29, 1998). EPA has invidiously singled out Nicor for enforcement in an irrational and wholly arbitrary manner while natural gas transmission companies and other similarly situated natural gas distributors have not been subject to enforcement.

10. EPA’s claims are barred, in whole or in part, by the doctrine of laches. Nicor has repeatedly notified EPA of historic data and work to characterize PCBs in its natural gas pipeline system, including in the early 1980s and 2007. EPA never voiced any objection or concern to Nicor’s approach until 2012, nearly five years after Nicor’s voluntary disclosure of PCBs in certain locations in Park Ridge. Nicor has been prejudiced by EPA’s delay because while Nicor has documented its historic data and historic characterization efforts, witnesses and records have inevitably been lost. For example, Nicor’s long-time Coordinator of Codes and Environmental Engineering, who oversaw Nicor’s extensive PCB characterization work in the early 1980s, is now deceased.

11. The claims asserted and relief sought by EPA are barred, in whole or in part, by the equitable doctrine of estoppel. Nicor has reasonably relied upon affirmative conduct and representations by EPA, including long-standing written guidance, in managing PCBs in its

natural gas pipeline system in compliance with TSCA and associated regulations. *See, e.g.*, 63 Fed. Reg. at 35396 (explaining that a local natural gas distributor is exempt from characterization and analysis requirements if it has “document[ed] that the most likely source of PCB contamination was the natural gas pipeline that supplied [its] natural gas”); Highlights of Questions & EPA Answers, AGA PCB Workshop (July 29, 1998) (“If PCBs are introduced upstream of the system, then the gas utility is not introducing PCBs in a source.”); EPA Response to Comments Document on the Proposed Rule – Disposal of PCBs OPPTS Docket #66009A (May 1998) (“if a distribution system does not contain any sources, the owner/operator of the system would need to document that the most likely source of PCB contamination was from the natural gas pipeline system that supplied their natural gas”). If the interpretation or enforcement policy and proposed penalty now espoused by EPA in its Complaint are permissible under TSCA and associated regulations, EPA is estopped from asserting that interpretation or implementing that enforcement policy because EPA has wrongfully misled Nicor regarding the requirements of TSCA and associated regulations and enforcement policy as they apply to Nicor, and application of the new interpretation and enforcement policy would cause Nicor significant harm and injury.

12. EPA’s claims are barred, either in whole or in part, because it seeks to impose an excessive fine in violation of the Eighth Amendment to the United States Constitution. As set forth previously, EPA’s current interpretations of the Mega Rule are novel and unsupported by its own long-standing guidance and Nicor lacked fair notice that its conduct purportedly violated applicable regulatory requirements.

**3(C): All Factual Information Respondent Considers Relevant To
The Assessment Of A Penalty And Any Supporting Documentation
And**

**3(D): Narrative Statement Explaining Factual And Legal Bases For Position That
The Proposed Penalty Should Be Reduced Or Eliminated And Supporting Documentation**

In EPA's Initial Prehearing Exchange and accompanying exhibit CX40, EPA sets forth a penalty amount of \$311,454.50¹ and its purported basis for that penalty. Each of EPA's count-specific proposed calculations, however, should be eliminated or reduced for the reasons detailed below.²

A. The Proposed Penalty Should Be Eliminated Because Nicor Is Not Liable On Any Count.

As detailed above and will be established by the evidence cited, Nicor is not liable on Counts I and II of the Complaint because Nicor's natural gas pipeline system does not include potential sources of introduction of PCBs ≥ 50 ppm, *see* 40 C.F.R. § 761.30(i)(1)(iii)(B), and regardless, Nicor complied by previously characterizing the extent of PCB contamination and analyzing all potential sources of PCBs, *see, e.g.*, 40 C.F.R. § 761.30(i)(1)(iii)(E). Further, the repeat sampling and analysis requirements of 40 C.F.R. § 761.30(i)(1)(iii)(A)(5)—the basis for Count III of the Complaint—does not apply to the four locations identified in Count III because the samples at those locations that form the basis for EPA's allegations do not qualify as

¹ In its Prehearing Information Exchange, EPA states it will seek leave to increase the penalty for additional inflation at a later date. Nicor reserves its right to object to any motion by EPA for leave to increase the penalty alleged in its Complaint.

² Section 16(a)(2)(B) of TSCA provides the broad factors EPA is to take into account in determining the amount of a civil penalty under TSCA. 15 U.S.C. § 2615(a)(2)(B). The framework of how those factors will be applied is set forth in the EPA's April 9, 1990 Polychlorinated Biphenyls (PCB) Penalty ("PCB Penalty Policy"), which revised the Guidelines for the Assessment of Civil Penalties under Section 16 of the Toxic Substances Control Act: PCB Penalty Policy (45 Fed. Reg. 59770 Sept. 10, 1980).

characterization samples under 40 C.F.R. § 761.30(i)(4). Moreover, PCBs at those locations were associated with sources outside of Nicor's natural gas pipeline system.

Nicor therefore maintains that all evidence cited above as supporting Nicor's denials and defenses is relevant to the assessment of a penalty and requires a finding of no penalty.

B. The Proposed Penalty Should Be Reduced On Counts I, II, and III Based On The Circumstances, EPA's Own Delay, And Nicor's Attitude and Lack Of Culpability.

To the extent any finding of liability on Counts I, II, or III necessitates the assignment of a penalty, the penalty proposed in those Counts should be reduced on the following bases:

Gravity. Gravity is improperly characterized for all three Counts as Circumstance High Level 2. Even if Nicor's systems had potential sources, it had previously characterized the extent of PCB contamination in accordance with the PCB Mega Rule (*see* section 3B, above), and the evidence will show that there was minimal, if any, risk of harm at any location where PCBs were detected, as established by EPA's own consultants. Further, regarding the locations identified in Count III, the evidence will demonstrate that the sampling done at these locations does not establish violations by Nicor. Accordingly, EPA's characterization of the three Counts in the Complaint as High Level is inappropriate, particularly when compared to the examples of such violations in the PCBs Penalty Policy, such as storage of combustible solvents near a transformer area or failure to report a fire-related incident. *See* PCBs Penalty Policy, at 10-11. Based on the minimal risk presented, these are, at most, minor use violations, that would fall in the mid to low range of any applicable circumstances. *See* PCBs Penalty Policy, at 9-12.

Number of Violation Days. The number of violation days listed for each of the Counts is too high.

- For Count I, the failure to characterize a system is a one-time requirement and should be limited to a single violation. *See* 40 C.F.R. § 761.30(i)(1)(A)(2). Further, EPA’s own evidence demonstrates that Nicor voluntarily disclosed to EPA no later than June 13, 2007, which is only 6 days after June 7, 2007 (120 calendar days after February 7, 2007). *See* CX 11. Any alleged delay in characterization was based on negotiations with EPA, thereby necessitating that the number of violation days be reduced.
- For Count II, the evidence will demonstrate that Nicor worked with the EPA on its sampling protocol and other remediation efforts in 2007, which is contrary to EPA’s allegations that Nicor failed to do requisite sampling. *See* 40 C.F.R. § 761.30(i)(1)(A)(3). Further, the assessment of per-day penalties “is reserved for repeated acts, or acts that present considerable risk or harm, such as where someone improperly disposes of PCBs on more than one occasion, or when someone illegally imports PCBs on separate occasions. Each day of such violations is significant and warrants a separate penalty.” *See* PCBs Penalty Policy, at 12. Nicor’s alleged failure to do the requisite sampling is not an example of repeated intentional conduct, and therefore the number of violation days should be significantly reduced.
- For Count III, there is no indication in the regulation that the annual requirement is re-triggered each year that a sampling does not occur. Further, the circumstances do not warrant a per-day penalty, as there is no evidence of repeated intentional conduct.

Adjustment for Lack of Culpability. An additional 25% decrease for each Count is necessary based on Nicor’s lack of culpability. As will be demonstrated by the evidence, any PCBs in Nicor’s natural gas system were introduced by upstream sources over which Nicor had no control. Further, Nicor lacked knowledge of any alleged violation based on the plain

language of the PCB Mega Rule, long-standing EPA guidance, and industry standards and practices. *See* Section 3B, above; see also PCBs Penalty Policy, at 15.

Voluntary Disclosure/Attitude. For each Count, the Voluntary Disclosure adjustment should be a higher percentage decrease, and/or an additional decrease should be given for Nicor's "attitude," based on Nicor's ongoing investigation, its timely disclosure, and the fact that the company worked with EPA and state and local agencies to establish inspection and sampling protocols and related remediation efforts, and Nicor fully complied with all applicable requirements. *See* PCBs Penalty Policy, at 17-18. Moreover, Nicor understands that EPA has used Nicor's PCB protocols developed in 2007 as best practices and exemplars for other natural gas pipeline systems.

Dated: August 26, 2016

NICOR GAS COMPANY

By: /s/ Mark R. Ter Molen
One of Its Attorneys

Mark R. Ter Molen
mtermolen@mayerbrown.com
Jaimy L. Hamburg
jhamburg@mayerbrown.com
Matthew C. Sostrin
msostrin@mayerbrown.com
Laura R. Hammargren
lhammargren@mayerbrown.com
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606
Telephone: 312-782-0600
Facsimile: 312-701-7711

