

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

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<i>In the Matter of :</i>)	
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Nicor Gas)	Docket No. TSCA-HQ-2015-5017
1844 Ferry Road)	
Naperville, Illinois 60563)	
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Respondent.)	
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**RESPONDENT’S MOTION
FOR ADDITIONAL DISCOVERY AND FOR EXTENSION OF TIME**

Respondent Nicor Gas (“Nicor”), pursuant to 40 C.F.R. § 22.19(e) and § 22.7(b), hereby moves for additional discovery following the parties’ prehearing information exchange and for an extension of time to file dispositive motions regarding liability to allow time to conduct the additional discovery. Nicor seeks to depose six witnesses: (1) Dr. Michelle Watters and Dr. Justin Roberts, EPA’s disclosed experts; (2) Tony Baney, Kendall Moore, and Tony Martig, current EPA employees with personal knowledge of key issues in this proceeding; and (3) Michael Calhoun, a former EPA employee who has not agreed to speak with Nicor voluntarily. Nicor also seeks responses to limited interrogatories and document requests, as described below. Prior to filing this Motion, Nicor contacted counsel for Complainant, who indicated that Complainant opposes the relief requested herein.

I. MOTION FOR ADDITIONAL DISCOVERY

40 C.F.R. § 22.19(e)(1) provides that “a party may move for additional discovery” after the prehearing information exchange. The Presiding Officer may order discovery if it “(i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party; (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.” *Id.* The Presiding Officer may order depositions upon an additional finding that: “(i) The information sought cannot reasonably be obtained by alternative methods of discovery; or (ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.” *Id.* § 22.19(e)(3).

As shown below, these requirements are met here. The six depositions (out of 47 witnesses disclosed by the parties) and other discovery sought by Nicor will not unreasonably delay the proceeding nor unreasonably burden EPA. No hearing date is set, and Nicor proposes

that the parties complete this discovery within 160 days.¹ The discovery will also allow Nicor to streamline its witness examinations at hearing. This information is most reasonably obtained from EPA, and has significant probative value on disputed issues of material fact. Moreover, the depositions seek information that either cannot reasonably be obtained by other methods or may otherwise not be preserved for hearing. Nicor has conferred with EPA concerning the discovery sought herein. EPA has not agreed to provide it voluntarily.

A. Depositions

1. *Dr. Michelle Watters and Dr. Justin Roberts*

EPA has disclosed Drs. Watters and Roberts as expert witnesses concerning health and exposure concerns associated with PCBs. *See* EPA Initial Prehearing Exchange at 3 (Ex. A); EPA Rebuttal Prehearing Exchange at 1-2 (Ex. B). For Dr. Watters, EPA has provided an expert report discussing certain public health implications from residential exposure to PCBs. *See* Expert Report, Dr. Watters (Ex. C). EPA has not provided an expert report for Dr. Roberts. Instead, EPA has provided a curriculum vitae along with a one-sentence description of Dr. Roberts' anticipated testimony: "He will testify as an expert witness regarding secondary exposure relating to inhalation of the PCBs and transformation from PCBs to other compounds (dioxins and furans) through a process of heating and volatilization." Ex. B at 1.

It is well settled that in order to prepare for hearing, a respondent "is entitled to discover the expert opinions of [a] witness, as well as the basis for those opinions." *In re Env'tl. Prot. Servs., Inc.*, 2003 WL 21213214, at *2 (EPA ALJ Apr. 25, 2003). A request to depose an expert "regarding the conclusions of the [expert], as well as the basis for those conclusions, is a reasonable one which satisfies the criteria for further discovery...." *In re Intermountain Farmers Assoc.*, 2000 WL 343971, at *1 (EPA ALJ Mar. 24, 2000).

Here, EPA's one-sentence disclosure of Dr. Roberts' anticipated testimony is plainly insufficient to disclose either his opinions or the basis for his opinions. *See, e.g., Env'tl. Prot. Servs.*, 2003 WL 21213214, at *2 (granting deposition request after a similarly "cryptic" disclosure that failed to "identify this witness's area of expertise, the basis of his expertise, his expert opinion, or the basis for that opinion"). Moreover, the description of the testimony of Dr. Roberts is identical to one of the topics expected to be covered by Dr. Watters. Deposing Drs. Roberts and Watters will enable Nicor to identify whether their testimony will be duplicative and needlessly cumulative.

Moreover, while EPA has disclosed an expert report for Dr. Watters, that report still does not fully disclose Dr. Watters' opinions and the basis for those opinions. For example, the report does not disclose any opinions about Nicor or the events underlying the Complainant's allegations. In fact, Dr. Watters' report does not even mention Nicor, other than in reference to the case caption. A deposition of Dr. Watters is needed to determine whether Dr. Watters intends to opine on issues specific to Nicor, PCBs in Nicor's natural gas pipeline system, or the

¹ Nicor's lead counsel, Mark Ter Molen, has an upcoming trial in Indiana state court that will occupy the majority of his time from mid-December 2016 through mid-February 2017. The 160 days is also to allow Mr. Ter Molen sufficient time to participate in discovery.

allegations of the Complaint. Likewise, Dr. Watters' report does not disclose the bases for her general opinions regarding the public health implications for exposure to PCBs from natural gas pipelines. Nicor is entitled to depose Dr. Watters to elicit the bases for her opinions.

2. *Tony Baney, Kendall Moore, and Tony Martig*

EPA has disclosed Tony Baney, Kendall Moore, and Tony Martig as fact witnesses. Mr. Baney is a Compliance Officer at EPA Headquarters. Among other things, he reviewed evidence from EPA's oversight of Nicor, determined that Nicor is purportedly in violation of TSCA, and calculated EPA's proposed penalty. Ex. A at 1-2. Mr. Moore works at EPA Region 5 and conducted inspections, interacted with homeowners, and collected split samples associated with EPA's investigation. *Id.* at 2-3. Mr. Martig also works at EPA Region 5 and will testify to a June 2007 conversation when Nicor voluntarily reported the detection of PCBs. *Id.* at 3-4.

Nicor is also entitled to depose these EPA employees. "[I]n order to properly prepare its defense to the charges leveled against it, common sense and basic fairness require that [Nicor] be given the opportunity to review and consider the sworn statements of opposing witnesses before the hearing begins. The fact that [a witness] may be available for cross-examination is simply too little, too late." *Envtl. Prot. Servs., Inc.*, 2003 WL 21213214, at *1.

Thus, Presiding Officers have ordered depositions of EPA employees who were either involved in inspections, determined to take an enforcement action, or calculated proposed penalties. *See, e.g., In re McKinney Crushing Co.*, 2000 WL 1222214, at *1 (EPA ALJ July 20, 2000) (ordering deposition of three EPA witnesses who conducted inspection, calculated proposed penalty, and approved enforcement action); *In re Frank Acierno*, 2008 WL 483488, at *34 (EPA ALJ Feb. 15, 2008) (ordering deposition of EPA witness who conducted site inspections and developed proposed penalty); *Envtl. Prot. Servs., Inc.*, 2003 WL 21213214, at *1 (ordering depositions of two EPA inspectors because "respondent cannot fairly prepare for the hearing in this case without more detail as to" the inspectors' "knowledge concerning the facts surrounding [their] inspection of [respondents'] facility").

Messrs. Baney, Moore, and Martig each possess unique information that has significant probative value on disputed issues. Messrs. Baney and Moore are "central actor[s]" in this proceeding. *Frank Acierno*, 2008 WL 483488, at *34. They conducted or reviewed inspections, and in Mr. Baney's case, determined that Nicor was purportedly in violation of TSCA and calculated the proposed penalty. Further, Mr. Martig took Nicor's call in 2007 when it voluntarily reported the detection of PCBs. The information sought from Messrs. Baney, Moore, and Martig also cannot be obtained through other methods of discovery. *See, e.g., Frank Acierno*, 2008 WL 483488, at *34 ("The simple fact is that Interrogatories are easily evaded and are not an effective manner of dealing with matters of veracity and credibility.").

3. *Michael Calhoun*

Nicor disclosed Mr. Calhoun as a witness. *See* Respondent's Prehearing Exchange at 13 (Ex. D). Mr. Calhoun is a former EPA employee who worked on EPA's Compliance Monitoring Program in the 1980s and 1990s. EPA's Compliance Monitoring Program tracked 13 interstate transmission companies whose systems contained PCBs. Nicor seeks information from Mr.

Calhoun concerning the presence of PCBs in interstate pipelines (which Nicor contends are the likely source of PCBs detected in its natural gas distribution system), EPA's Compliance Monitoring Program, and other, related issues involving PCBs.

Because Mr. Calhoun is no longer employed by EPA, in September 2016, Nicor contacted him to inquire whether he would speak to Nicor voluntarily. Mr. Calhoun was unsure and wanted to check with "his people" at EPA before agreeing to meet. Ultimately, Mr. Calhoun declined to meet with Nicor. As a result, Nicor has been unable to procure Mr. Calhoun's knowledge through other means. And because Mr. Calhoun is no longer employed by EPA and has not agreed to meet voluntarily with Nicor, there is substantial reason to believe that his testimony may otherwise not be preserved for presentation at the hearing.

B. Interrogatories and Document Requests

One of the central issues in this case is whether the identification of PCBs in four customer gas meters in Park Ridge, Illinois in 2007 triggered a duty for Nicor to analyze "potential sources of introduction of PCBs into [its] natural gas pipeline system." 40 C.F.R. § 761.30(i)(1)(iii)(A)(3) (emphasis added); *see also id.* § 761.30(i)(1)(iii)(B) (exempting natural gas pipeline systems "which do not include potential sources of PCB contamination as described in paragraph [(A)(3)] containing \geq 50 ppm PCB").

When EPA promulgated the "Mega Rule," it made clear that § 761.30(i)(1)(iii)(B) exempts a local natural gas distributor from characterization and analysis requirements if it has "document[ed] that the most likely source of PCB contamination was the natural gas supplier that supplied [its] natural gas." 63 Fed. Reg. 35383, 35396 (June 29, 1998); *accord* Highlights of Questions and EPA Answers, Am. Gas Ass'n PCB Workshop (July 29, 1998) ("If PCBs are introduced upstream of the system, then the gas utility is not introducing PCBs in a source."). The Mega Rule also expressly allows a distributor to "use historical data" to satisfy characterization and analysis requirements. 40 C.F.R. § 761.30(i)(1)(iii)(E).

As Nicor will prove at hearing, it established in the early 1980s—and submitted documentation to EPA at that time—that its system does not include potential sources of PCBs \geq 50 ppm and that upstream natural gas suppliers are the most likely source of introduction of PCBs into its system. Based on its work in the early 1980s, Nicor has treated the Park Ridge area of its system as PCB-containing since the promulgation of the 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 after discovery of PCBs \geq 50 ppm ... or by December 28, 1998, whichever is later," 40 C.F.R. § 761.30(i)(1)(iii)(A)(2)), and does not require re-characterization or re-analysis any time PCBs \geq 50 ppm are subsequently detected.

In this action, EPA is asserting a novel interpretation of the Mega Rule. According to EPA, "potential sources of introduction of PCBs" (40 C.F.R. § 761.30(i)(1)(iii)(A)(3)) includes not only the *original* source of PCBs, but also equipment (compressors, scrubbers, filters, or interconnects) that could capture and "re-introduce" PCBs that may be moving around a system, even if those PCBs were introduced by upstream suppliers. This interpretation is contrary to EPA's longstanding guidance and would render the § 761.30(i)(1)(iii)(B) exemption a nullity. Moreover, EPA asserts that Nicor's historic data is subject to—and does not meet—the

analytical requirements in 40 C.F.R. § 761.1(b)(2), first enacted in 1998. As a result, according to EPA, Nicor was required to re-characterize and re-analyze its system in 2007. For its part, EPA denies that its interpretation is new or contrary to the Mega Rule and longstanding agency guidance.

Nicor has propounded the following interrogatories and document requests to test those assertions and require EPA to identify prior instances (if any) where it has either (i) brought an enforcement action asserting its current interpretation of the Mega Rule or (ii) otherwise informed owners and operators of natural gas pipeline systems of its current interpretation. This information is probative not only to properly interpreting the Mega Rule, but also to support Nicor's defenses that EPA's interpretation is arbitrary and capricious and that EPA failed to provide fair notice of its interpretation to Nicor and the regulated community. EPA has not agreed to answer these interrogatories or document requests voluntarily.

Interrogatory No. 1: Identify any prior enforcement actions or guidance documents where EPA asserted that "potential sources of introduction of PCBs" (40 C.F.R. § 761.30(i)(1)(iii)(A)(3)) include not only the original source of PCBs, but also equipment (compressors, scrubbers, filters, or interconnects) that could capture and "re-introduce" PCBs that may be moving around a natural gas pipeline system.

Document Request No. 1: For any prior enforcement actions or guidance documents identified in response to Interrogatory No. 1, produce the complaint initiating the action, prehearing exchanges and any additional written discovery (or the equivalent if filed in federal district court), and any rulings in the action, along with the guidance documents.

Interrogatory No. 2: Identify any prior enforcement actions or guidance documents where EPA asserted that "historical data" under 40 C.F.R. § 761.30(i)(1)(iii)(E) is subject to the analytical requirements in 40 C.F.R. § 761.1(b)(2).

Document Request No. 2: For any prior enforcement actions or guidance documents identified in response to Interrogatory No. 2, produce the complaint initiating the action, prehearing exchanges and any additional written discovery (or the equivalent if filed in federal district court), and any rulings in the action, along with the guidance documents.

II. MOTION FOR EXTENSION OF TIME

Nicor also moves for an extension of time pursuant to 40 C.F.R. § 22.7(b) to comply with the deadline for dispositive motions regarding liability. The September 7, 2016 Order stated that dispositive motions regarding liability must be filed within 30 days after Complainant's Rebuttal Prehearing Exchange, or by November 7, 2016. By order dated October 21, 2016, on EPA's unopposed motion, that deadline was extended through December 5, 2016.

To accommodate the additional discovery sought herein (which Nicor proposes that the parties complete within 160 days), Nicor respectfully requests an extension of the dispositive motion deadline until 60 days after the completion of additional discovery. The extension of the dispositive motion deadline is sought for good cause to enable Nicor to conduct additional discovery, and no prejudice will result.

For the foregoing reasons, Nicor respectfully requests an Order permitting Nicor to conduct additional discovery as provided herein to be completed within 160 days and extending the deadline for dispositive motions for 60 days after the discovery deadline.

Dated: November 2, 2016

NICOR GAS COMPANY

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

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CERTIFICATE OF SERVICE

I certify that the foregoing Respondent's Motion for Additional Discovery and for Extension of Time, dated November 2, 2016, was sent this day in the following manner to the addressees listed below:

Original and Copy by OALJ E-Filing System to:

Headquarters Hearing Clerk
U.S. Environmental Protection Agency

and

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