



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:)
)
Nicor Gas,) Docket No. TSCA-HQ-2015-5017
)
Respondent.)

ORDER ON COMPLAINANT'S MOTION IN LIMINE

The United States Environmental Protection Agency, Office of Enforcement and Compliance Assurance, Office of Civil Enforcement, Waste and Chemical Enforcement Division ("Complainant" or "Agency") initiated this proceeding against Nicor Gas ("Respondent") in September 2015.

The parties subsequently completed their prehearing exchanges. In its prehearing exchange ("RPHX"), Respondent indicated its intent to call as a witness Mony Chabria, an attorney in the Agency's Region 5 Office of Regional Counsel. RPHX at 13. Respondent plans to "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." RPHX at 13.

The Agency on November 1, 2016, filed a motion in limine ("Motion") to stop Mr. Chabria from testifying. The Agency argues that "testimony from an attorney who has served in the role of an attorney in the matter presently before this court should be excluded" and that attorney-client and work product privileges would be jeopardized if Mr. Chabria were required to take the stand. Mot. at 1-2. The Agency contends that Mr. Chabria has been "actively involved as an attorney in various aspects of this enforcement case" and has discussed case strategy and case-related matters with EPA personnel. Mot. at 2. Consequently, his testimony would "be influenced by judgments[sic] and perceptions the attorney contemplated during case development and, accordingly, should be barred as attorney-client communications and attorney work product." Mot. at 2.

In opposition, Nicor Gas argues that Mr. Chabria "has unique personal knowledge regarding Nicor's communications and interactions with EPA and other government agencies" and states he will be questioned "as a fact witness with personal knowledge of various non-privileged dealings directly with Nicor." Respondent's Memorandum in Opposition to Complainant's Motion in Limine at 1 (Nov. 16, 2016) ("Opposition"). Respondent also contends that because Mr. Chabria was its main point of contact during the Agency's investigation, it

needs his testimony about the company's cooperation during the investigation and for its defense of selective enforcement. Opposition at 1-2. But Nicor will not "question Mr. Chabria about any internal communications at the EPA or communications between EPA and the IEPA or Illinois Attorney General's Office." Opposition at 2. "Nicor merely seeks to question Mr. Chabria about the interactions with Nicor and information provided by Nicor, as well as EPA's public actions with respect to its investigation into PCBs in [a competitor's] natural gas pipeline system." Opposition at 4.

The Agency's Motion is premature. The time for filing dispositive motions has not yet expired, and as of now, no hearing has been set in this case. Indeed, it will now be several more months until a hearing is scheduled so that Respondent may engage in additional discovery. *See Order on Respondent's Motion for Additional Discovery and for Extension of Time* (Nov. 22, 2016). At this stage, it is unknown to what extent this additional discovery may narrow or redirect the focus of this matter or what further discussions may take place between the parties that might obviate the need for Mr. Chabria's testimony. Similarly, dispositive motions may alter the landscape of this proceeding prior to hearing in a way that impacts Mr. Chabria's proposed testimony. Finally, it seems that a substantial amount of the testimony Mr. Chabria would provide may be stipulated to by the parties, obtained through other discovery methods, or provided by other witnesses, potentially eliminating either the need for Mr. Chabria's testimony or the Agency's objections.

Consequently, at this time, the Agency's Motion is **DENIED without prejudice**. Should the parties fail to negotiate a mutually satisfactory way of introducing into evidence the substance of Mr. Chabria's expected testimony, the Agency may, after a hearing has been scheduled, renew its motion.

SO ORDERED.



Christine Donelian Coughlin
Administrative Law Judge

Dated: November 22, 2016
Washington, D.C.

In the Matter of *Nicor Gas*, Respondent.
Docket No. TSCA-HQ-2015-5017

CERTIFICATE OF SERVICE

I certify that the foregoing **Order on Complainant's Motion in Limine**, dated November 22, 2016, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.



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