UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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

RESPONDENT'S MEMORANDUM IN OPPOSITION TO COMPLAINANT'S MOTION IN LIMINE TO EXCLUDE ATTORNEY MONY CHABRIA AS A WITNESS

Respondent Nicor Gas ("Nicor") hereby submits this response in opposition to Complainant's November 1, 2016 Motion in Limine to Exclude Attorney Mony Chabria as a Witness.

I. FACTUAL BACKGROUND

Mr. Chabria, who happens to be an attorney, has unique personal knowledge regarding Nicor's communications and interactions with EPA and other government agencies. Nicor intends to question Mr. Chabria in his capacity as a fact witness with personal knowledge of various non-privileged dealings directly with Nicor. Specifically, Nicor seeks 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." Respondent's Prehearing Exchange ¶ 28.

Mr. Chabria was also involved in EPA's investigation of PCBs in Ameren's natural gas pipeline system in Southern Illinois and the presence of PCB-containing liquids in pipelines, interconnects, gas meters, and customer locations and soils associated with Ameren's system. Mr. Chabria therefore also has direct knowledge of EPA's lack of enforcement against Ameren, and possibly other natural gas pipeline systems, which is relevant to Nicor's defense of selective enforcement. To the extent these topics were not sufficiently identified in Nicor's prehearing exchange, Nicor hereby supplements its prehearing exchange as permitted by 40 C.F.R. § 22.19(f).

Mr. Chabria's testimony on these matters is of significant probative value to the appropriateness of the proposed penalty against Nicor, if Nicor is found liable at all, as it will demonstrate Nicor's fulsome cooperation with government regulators as well as EPA's lack of

enforcement against other similarly situated natural gas distribution companies. Mr. Chabria was a main point of contact with Nicor during Nicor's PCB investigation and has unique and highly probative knowledge of the extent of Nicor's cooperation with these agencies. Nicor's right to a defense on the amount of any potential penalty therefore depends on large part on his testimony.

Nicor does not intend to question Mr. Chabria about any internal communications at the EPA or communications between EPA and the IEPA or Illinois Attorney General's Office. The only topics that Nicor intends to inquire about are factual matters regarding communications with Nicor, information that was provided by Nicor, and public non-confidential information regarding PCBs in Ameren's natural gas pipeline system. Such purely factual questions do not, as EPA argues, "require Mr. Chabria to express legal conclusions and interpretations." Nicor does not seek any information from Mr. Chabria that might be implicated by the attorney-client privilege, the attorney work product doctrine, the deliberative process privilege, or the uniform common interest doctrine. As set forth more fully below, Nicor's intended questioning of Mr. Chabria is consistent with legal precedent.

Mr. Chabria's factual testimony also does not, contrary to EPA's vague assertions, somehow "jeopardize" privileged information, and it is not "influenced by judgments and perceptions" that are protected by a privilege. EPA does not provide a single example of how such a breach could result, nor is it plausible. The intended testimony only relates to facts surrounding non-privileged interactions with Nicor and non-privileged facts regarding PCBs in Ameren's natural gas pipeline system. Furthermore, even if the actions that Mr. Chabria took in interacting with Nicor or Ameren were influenced by his undisclosed legal impressions, the third party communications that arose therefrom and the public actions of EPA are simply not privileged.

II. LEGAL ARGUMENT

As EPA's own case law makes clear, "'[a] motion in limine should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose.' Motions in limine are generally disfavored." *In re Strong Steel Prod., LLC*, 2005 E.P.A. ALJ LEXIS 7 at *1-2 (EPA Feb. 18, 2005). As another case relied on by EPA observes, "because the privilege is in derogation of the search for the truth, it is construed narrowly." *United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997). EPA has not demonstrated that Nicor's intended questioning would invade the attorney-client privilege, the attorney work product doctrine, or any other properly-construed confidentiality. Accordingly, EPA cannot overcome these high hurdles and its motion should be denied.

EPA adjudicators have permitted questioning of attorneys on purely factual matters that do not implicate legal privilege. For example, in *In re Gen. Elec. Co.*, 1994 WL 16787158, at *2 (E.P.A. Sept. 1, 1994), the ALJ permitted Respondent's attorney to be called as a witness on factual matters that had been placed in issue by GE, but directed that "his testimony may be limited to *the fact* of the telephone conversation allegedly conducted with Region V." (emphasis added). Importantly, the ALJ also noted that, for questioning that would be inappropriate or outside of the scope of this subject matter, "constraints may be implemented through appropriate

objections at the hearing." *Id.* The same is true here—EPA will be able to assert any objections to Nicor's factual questioning of Mr. Chabria at the hearing, if necessary.

Courts have also made clear that it is appropriate for an attorney to serve as a fact witness, particularly when testifying about personal knowledge of non-privileged communications. *See Petrilli v. Drechsel*, 94 F.3d 325, 330 (7th Cir. 1996) ("McCormick testified as a fact witness about meetings that Petrilli attended and statements that Petrilli made regarding his new employment opportunity and his separation from Inland. Although McCormick was involved throughout the Petrilli litigation—as one would expect an in-house counsel to be—he did not act as an advocate for Drechsel or Scheffers. The mere fact that he is an attorney does not disqualify him as a witness."); *Espejo v. Santander Consumer USA, Inc.*, 2014 WL 6704382, at *2 (N.D. Ill. Nov. 25, 2014) (noting that "this Court has allowed the depositions of in-house counsel to proceed, explaining that 'not every communication between a lawyer and a client is automatically privileged' and that parties can generally be expected to assert objections during the course of a deposition to protect against disclosure of privileged information"). As at least one court has explained, "In Illinois, 'the attorney-client privilege protects only communications and is not a wholesale bar to a witness' accessibility.' Moreover, 'challenges to the taking of an attorney's deposition, based upon claims that any of the attorney's testimony will involve disclosure of privileged information or 'work product,' have been held to be premature.'" *Quality Croutons, Inc. v. George Weston Bakeries, Inc.*, 2006 WL 2375460, at *2 (N.D. Ill. Aug. 14, 2006) (granting motion to compel deposition of two attorney witnesses). The same standard should apply here.

EPA's invocation of the uniform common interest doctrine, meanwhile, is without merit. As EPA explains, "[t[he Common Interest Doctrine 'serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.'" Motion at 4-5. As applied to the circumstances of this case, this privilege can, at most, protect confidential communications between counsel for the various government agencies involved in regulating Nicor and Ameren. It cannot protect communications that are not "confidential" in the first instance because Nicor or Ameren was a party to the communications or because they were public communications. Because Nicor seeks to question Mr. Chabria on communications that *involved* Nicor or that were public communications regarding PCBs in Ameren's system, the common interest doctrine cannot shield those communications.

Moreover, none of the caselaw relied on by EPA speaks to the present situation. For example, in *In re Proceedings to Determine whether to Withdraw Approval of North Carolina's Hazardous Waste Mgmt Program*¸ 1989 EPA ALJ Lexis 36, *30 (E.P.A. Nov. 30, 1989), the ALJ concluded that the notes and memoranda from a meeting between government regulatory agencies that included counsel were protected by the attorney-client privilege and the attorney work-product doctrine. That meeting did not include the intended target of the subject regulations, but was a "closed" meeting between the regulators. Nicor, by contrast, does not seek any information about any closed meetings or communications such as this, as Nicor is only interested in demonstrating that it acted cooperatively in *its* interactions with regulators. In both *In re Hawaiian Indep. Refinery, Inc.*, 1992 EPA ALJ LEXIS 311, *10-11 (E.P.A. July 14, 1992)

and *In re Ensco, Inc.*, 1992 EPA ALJ LEXIS 898, *19-20 (E.P.A. May 7, 1992),[1] the respondents sought documents showing internal communications between government personnel debating the proper penalty calculations. Similarly, in *In re Lu Verne G. Kienast*, 2001 EPA ALJ LEXIS 168, *2-3 (E.P.A. Nov. 30, 2001), the respondent sought production of a memorandum between counsel for the Department of Justice and EPA Region 5 regarding authorization to waive the twelve-month limitations period for bringing an action under the Clean Air Act.[2] And in *In re Chautauqua Hardware Corp.*, 3 E.A.D. 616 (E.P.A. June 24, 1991), the respondent sough "documents, including but not limited to internal memoranda, notes, correspondence, and written legal opinions discussing the purpose and the legal basis for EPA's [Enforcement Policy]." By contrast, Nicor seeks neither internal documents exchanged within and between government agencies nor to question Mr. Chabria about such purely internal matters. Instead, 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 Ameren's natural gas pipeline system.

In sum, the subject matter of Nicor's proposed questioning of Mr. Chabria relates only to the facts surrounding non-confidential matters. Such questioning does not invade any properly-construed legal privilege and is wholly proper. EPA has not identified any basis for a blanket exclusion of *all* testimony by Mr. Chabria simply because he happens to be an attorney. If, during the hearing, EPA believes that Nicor is asking particular questions that it believes invade privilege, it is perfectly capable of objecting to those questions, and the presiding officer is perfectly capable of ruling on those objections.

For the foregoing reasons, EPA's Motion to exclude Mony Chabria as a witness should be denied.

Dated: November 16, 2016

NICOR GAS COMPANY

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

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[1] Contrary to Complainant's assertion in its Motion, *In re Enesco* does not address the question of whether EPA attorneys can serve as witnesses, and such testimony was never sought in that case.

[2] *In re Lu Verne G. Kienast* likewise does not deal with the question of whether EPA attorneys can serve as witnesses, contrary to EPA's assertion in its Motion.

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CERTIFICATE OF SERVICE

I certify that the foregoing Respondent's Memorandum in Opposition to Complainant's Motion in Limine to Exclude Attorney Mony Chabria as a Witness, dated November 16, 2016, was sent this day in the following manner to the addressees listed below:

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