STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On its Own Motion	)	
	)	Docket No. 01-0705
Northern Illinois Gas Company d/b/a NICOR Gas Company	)	
Reconciliation of Revenues collected under Gas Adjustment Charges with Actual Costs Prudently incurred	)	
Illinois Commerce Commission On its Own Motion	)	
	)	Docket No. 02-0067
Northern Illinois Gas Company d/b/a NICOR Gas Company	)	
Proceeding to review Rider 4, Gas Cost, pursuant To Section 9-244 (c) of the Public Utilities Act	)	
Illinois Commerce Commission On its Own Motion	)	
	)	Docket No. 02-0725
Northern Illinois Gas Company d/b/a NICOR Gas Company	)	
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BRIEF ON EXCEPTIONS
THE RETAIL ENERGY SUPPLY ASSOCIATION
AND INTERSTATE GAS SUPPLY OF ILLINOIS, INC.

ORAL ARGUMENT REQUESTED

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BRIEF ON EXCEPTIONS
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AND INTERSTATE GAS SUPPLY OF ILLINOIS, INC.

I. INTRODUCTION

Pursuant to 83 Ill. Admin. Code Section 280.830 and the schedule established by the Administrative Law Judges in this proceeding, the Retail Energy Supply Association ("RESA") and Interstate Gas Supply of Illinois, Inc. ("IGS") hereby submit their Brief on Exceptions in this

proceeding. Section VIII of this Brief on Exceptions contains, pursuant to 83 Ill. Admin. Code Section 280.850, a statement in support of RESA's and IGS' request for oral argument. Appendix A to this Brief on Exceptions sets forth RESA's and IGS' Exceptions, setting forth their suggested replacement statements and findings.

II. BACKGROUND

RESA is a non-profit trade association of independent corporations that are involved in the competitive supply of electricity and natural gas.[1] RESA and its members are actively involved in the development of retail and wholesale competition in electricity and natural gas markets throughout the United States. Some of the members of RESA have certificates from the Illinois Commerce Commission (the "Commission") under Section 19-110 of the Public Utilities Act to operate as Alternative Retail Gas Suppliers in the State of Illinois, including the service territory of the Northern Illinois Gas Company d/b/a NICOR Gas Company ("NICOR Gas"), the respondent in this proceeding. Currently, these Alternative Retail Gas Suppliers provide gas supply service to tens of thousands of customers of NICOR Gas, including participants in the Customer Select Program offered by NICOR Gas, which is basically available to residential and small non-residential customers.

IGS is an Illinois corporation certified under Section 19-110 of the Public Utilities Act to operate as an Alternative Retail Gas Supplier in the service territories of Nicor Gas, The Peoples Gas Light and Coke Company, and North Shore Gas Company. IGS provides gas supply service to

[1] RESA's members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; MXenergy; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus, LLC; Reliant Energy Northeast LLC; Transcanada Power Marketing Ltd. and TriEagle Energy, L.P.. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

customers of Nicor Gas, including participants in the Customer Select Program offered by NICOR Gas.

RESA and IGS do not have an opinion and do not intend to address the question of whether there have been overcharges during the period covered by this proceeding (calendar years 1999-2002) or whether a refund is appropriate in this proceeding. The only issue in which RESA and IGS have an interest is, if the Commission does order a refund, the mechanism by which such refund would be made to the customers of Nicor Gas. In this regard, RESA and IGS note that Nicor Gas and the Commission Staff have entered into a Stipulation, pursuant to which Nicor Gas has agreed to a $64 million refund to customers. The ALJPO accepts this stipulated amount and, in addition, would impose a $8.1 million refund related to withdrawals of Nicor Gas from Natural Gas Pipeline Company of America's Delivered Storage Service tariff, for a total refund amount of $72.1 million. (ALJPO, p. 25)

The Stipulation between Nicor Gas and the Commission Staff does not specify the refund mechanism to be utilized. However, Staff witness Mary H. Everson has proposed a refund mechanism that is objectionable to RESA and IGS. Her proposal is that any refund in this proceeding be refunded to Nicor Gas' Purchased Gas Adjustment Clause ("PGA") customers, basically its sales customers, at the time of a refund, through an Ordered Reconciliation Factor (Factor O) of Rider 6, Gas Supply Cost, of Nicor Gas' Schedule of Rates (ICC Staff Ex. 6.0, pp. 8-9)

The ALJPO accepts the refund mechanism proposed by Ms. Everson. However, it does so based on the following flawed analysis:

> The Commission adopts Staff's proposed refund methodology. Although it does not make every customer whole that took service under the PA from 1999-2002, it is the most reasonable solution presented. Indeed, the refund allocation proposed by RESA is not any more equitable than Staff's and, importantly, it lacks evidentiary support. Because of the lack of evidentiary support, it is not clear how RESA's proposal would be implemented and, thus,

> cannot be adopted. The Commission also notes favorably that Staff's proposed methodology is consistent with Part 525, which is applicable to PGA reconciliation cases. (ALJPO, p. 31)

For the reasons cited in this Brief on Exceptions, the analysis of the ALJPO recommending the adoption of Staff's proposed refund mechanism is flawed. The Commission should reject the conclusion of the ALJPO and order that the refund should be made to all customers of Nicor Gas, including transportation customers, in the manner described in this Brief on Exceptions.

III. THE STAFF'S PROPOSED REFUND MECHANISM IS NOT THE MOST REASONABLE SOLUTION PRESENTED.

The first basis for the ALJPO's acceptance of Staff's proposed refund method is that, according to the ALJPO, "Although it does not make every customer whole that took service under the PGA from 1999-2002, it [Staff's proposed refund methodology] is the most reasonable solution presented." RESA and IGS would agree with the ALJPO that Staff's proposed refund method would be reasonable if this proceeding were a typical reconciliation case. For example, if this case concerned the reconciliation of gas costs and gas charge revenues for calendar year 2011 and a refund were going to be issued in calendar year 2012 or even 2013, Staff's proposed refund method would be both reasonable and equitable because, generally speaking, refunds would be made to the customers who paid the increased charges. This also assumes that there were no embedded costs within the reconciliation period that inequitably favored sales customer over shopping customers, or otherwise subsidized sales service.

However, this case concerns the reconciliation of gas costs and gas charge revenues for the period of calendar years 1999 through 2002. It is likely that the earliest any refund would be ordered would be during calendar year 2013. In this proceeding, directing a refund to the customers of Nicor Gas who are sales customers at a point in time in calendar year 2013 is inequitable because such a

direction would ignore the record evidence that there was a substantial shift in sales customers to transportation service from the period of calendar years 1999 through 2002 to the current period.

Since the period of calendar years 1999-2002, many of Nicor Gas' sales customers have become transportation customers; *i.e.* customers who purchase their natural gas supply from Alternative Retail Gas Suppliers (including IGS and members of RESA), but continue to receive delivery service from Nicor Gas. As of December 31, 1999, Nicor Gas had 1,861,308 sales customers and 67,733 transportation customers.[2] However, as of December 31, 2011, Nicor Gas had 1,932,591 sales customers and 252,297 transportation customers, approximately 185,000 more transportation customers than in 1999.[3] Some of the customers who were transportation customers as of December 31, 2011, were sales customers during some or all of the calendar years 1999 through 2002. The exact number is not known. In April 2006, Nicor Gas implemented a new customer billing system and detailed billing data prior to this date is not readily available.[4] In light of these statistics, the ALJPO's statement that Staff's refund mechanism "does not make every customer whole that took service under the PGA from 1999-2002" is quite an understatement. Customers who are transportation customers at the time of the refund won't get a penny.

During the cross-examination of Ms. Everson, the inequity of her proposed refund method for transportation customers was brought to light. The evidentiary record shows that Ms. Everson acknowledged that under her proposed refund method, refunds would be made to customers who were sales customers at the time of the refund; however, refunds would not be made to customers who were transportation customers at the time of the refund. She acknowledged that customers who are transportation customers at the time of the refund, but who were receiving sales service at any

[2] RESA/IGS Ex. 1.0, Agreed Stipulation of Facts Between Nicor Gas and the Retail Energy Supply Association, p. 2.

[3] *Id.*

[4] *Id.*

time during the years 1999-2002 would have paid gas charges to Nicor Gas during the years 1999-2002 for the periods that they were sales customers. She further acknowledged that under her proposed refund method, customers who were receiving sales service during the period 1999-2002 but who are transportation customers at the time of the refund in this proceeding would not receive a refund. In stark contrast, she admitted that a person who became a sales customer of Nicor Gas during the month of February 2012 and remained a sales customer at the time of the refund would receive a refund. She also admitted that she cannot identify the number of customers who are currently transportation customers of Nicor Gas, but who were receiving sales service from Nicor Gas at any time during the years 1999-2002. (TR. 1291-1298) Based on these statistics, in the evidentiary record of this proceeding, it is patently obvious that Staff's proposed methodology is completely unreasonable to the extent it excludes transportation customers.

Also, since the 1999-2002 service periods there have been rate cases filed by Nicor Gas. In those caes, a number of inequities were identified by the Retail Gas Suppliers that participated in those cases, requiring additional unbundling. Some of the inequities that were identified included items that would have subsidized the commodity rates of sales customers at the expense of shopping customers. For example, until the Commission entered its Order in Docket 04-0779 on September 20, 2005, Nicor Gas recovered uncollectibles associated with the commodity costs of sales customers through base rates, meaning that transportation customers subsidized sales customers. In its Order in Nicor Gas' next rate case, Docket 08-0363, the Commission approved a number of changes in the Customer Select program as a result of a memorandum of understanding between suppliers and Nicor Gas, including a credit for gas in storage as part of the Transportation Storage Credit.

Although these and some other inequities were resolved, partially or in total, all were resolved on a prospective basis. Now before the Commission is an opportunity to address some of the

subsidizations that have occurred over the years by shopping customers of sales customers. Instead, the ALJPO's proposed resolution would further exacerbate the situation, streaming dollars again to only the sales customer class, to the detriment of the shopping customers. The ongoing impact of this would go beyond the absolute inequity of the proposed reconciliation methodology, since those adverse to market development would then use the resulting inequitably deflated PGA rate (resulting from the streaming of $72.1MM to sales customers only) in comparisons between market based rates and default rates and proclaim the market results in higher rates to customers. Given that shopping customers paid costs of commodity service throughout the period from 1999 to the present day, many acknowledged and over time some resolved in rate cases, to not allow shopping customers to share in the recovery of dollars that they paid either directly as sales customers in the 1999-2002 period as sales customers, or through subsidized rate structures needing further unbundling over the subsequent years would be not only inequitable but unjust.

Staff's proposed refund method is unfair and inequitable. Under Staff's proposed refund method, customers who are currently transportation customers, but who were sales customers during all or part of the period of calendar years 1999-2002 and who subsidized the sales rate for a decade would not receive a refund because they would not be sales customers at the time of the refund. However, a brand new sales customer would receive a refund. Therefore, absent a Commission order requiring that any refund be handled more fairly across all customers including transportation customers, transportation customers at the time of a refund who were sales customers during all or part of calendar years 1999-2002 would not receive any refund as a result of this proceeding.

IV. THE REFUND MECHANISM PROPOSED BY RESA AND IGS IS MORE EQUITABLE THAN STAFF'S PROPOSED METHOD.

The ALJPO's second basis for its recommendation that the Commission adopt Staff's proposed refund mechanism is that the "refund allocation proposed by RESA is not any more equitable than Staff's". (ALJPO, p. 31)

RESA and IGS propose that the Commission's final order in this proceeding direct that any refund ordered be allocated in the manner utilized by the Commission in its Order in Docket 01-0706, for North Shore Gas Company. Specifically, the refund should be allocated in the following manner. The $72.1million refund recommended in the ALJPO (or the dollar amount of any refund ordered in this proceeding) should be allocated to all Rates based on each Rate's share of the total PGA gas consumed by all Rates during calendar years 1999-2002. Each Rate's allocation should be divided by the total number of customer accounts (both sales and transportation) receiving service under that Rate on the date the Commission's Order is entered. Refunds to all Rates shall be provided to both sales and transportation customer accounts.[5]

Contrary to the ALJPO's assertion, RESA's proposed method is more equitable than Staff's because it would provide a refund to transportation customers. Again, the evidentiary record shows that there was a dramatic transfer of sales customers to transportation service subsequent to the time of the period for which the refund was calculated (1999-2002).[6] Unlike Staff's proposed refund method, RESA's method would provide a refund for such customers. Under Staff's method, a customer who was a transportation customer at the time of the refund but was a sales customer during the period 1999-2002 would not get a refund; however, a customer who became a sales customer the

[5] In Ill. C. C. No. 01-0706, for North Shore Gas Company, the Commission made an exception by providing certain large-volume customers with a refund based on their individual usage. RESA and IGS are not proposing such an exception in this proceeding.

[6] RESA/IGS Ex. 1.

day before the refund starts flowing, would get a refund. The ALJPO does not attempt to explain how this result would be "equitable" or why RESA's method, which would provide a refund to such transportation customers, is not more equitable than Staff's method. In short, RESA and IGS see nothing equitable about excluding potentially 185,000 transportation customers who could have been sales customers during the 1999-2002 period from receiving refunds.

V. RESA'S REFUND METHOD HAS SUPPORT IN THE EVIDENTIARY RECORD.

The ALJPO's third basis for its recommendation that the Commission adopt Staff's proposed refund mechanism is that RESA's proposed refund method "lacks evidentiary support". (ALJPO, p. 31) However, RESA's proposed refund method does not lack evidentiary support—it is the ALJPO that is lacking in that it fails to include, in its discussion of RESA's position, the evidence in support of that position. That evidence comes in two forms. The first is the Agreed Stipulation of Facts between Nicor Gas and RESA/IGS, which was admitted into the record of this proceeding as RESA/IGS Exhibit 1.0. The second is the record of the cross-examination of the Staff witness who proposed the refund mechanism.

In contrast to the claim made in the ALJPO, the evidentiary record in this proceeding shows that directing a refund to the customers of Nicor Gas who are sales customers at a point in time in calendar year 2013, the most likely time when refunds would begin to flow under Nicor Gas' Rider 6, is inequitable because such a direction would ignore the substantial shift in sales customers to transportation service from the period of calendar years 1999 through 2002 to the current period.

As demonstrated in Section III, *supra*, since the period of calendar years 1999-2002, many of Nicor Gas' sales customers have become transportation customers; *i.e.* customers who purchase their natural gas supply from Alternative Retail Gas Suppliers (including IGS and members of RESA), but

continue to receive delivery service from Nicor Gas. As of December 31, 1999, Nicor Gas had 1,861,308 sales customers and 67,733 transportation customers.[7] However, as of December 31, 2011, Nicor Gas had 1,932,591 sales customers and 252,297 transportation customers, approximately 185,000 more transportation customers than in 1999.[8] RESA's evidence also consists of the record of the cross-examination of Ms. Everson, described in detail in Section III, *supra,* which demonstrated the inequity of her proposed refund method for transportation customers.

VI. CONTRARY TO THE ALJPO, IT IS CLEAR HOW THE COMMISSION COULD IMPLEMENT RESA'S PROPOSED REFUND METHOD.

The ALJPO's fourth basis for recommending Staff's refund mechanism is that "Because of the lack of evidentiary support, it is not clear how RESA's proposal would be implemented and, thus, cannot be adopted." (ALJPO, p. 31) On the contrary, it is completely clear how RESA/IGS' proposal would be implemented.

RESA and IGS propose that the Commission's final order in this proceeding direct that any refund ordered be allocated in the manner utilized by the Commission in its Order in Docket 01-0706, for North Shore Gas Company. Specifically, the refund should be allocated in the following manner. The $72.1 million refund recommended by the ALJPO (or the dollar amount of any refund ordered in the Commission's final order in this proceeding) should be allocated to all Rates based on each Rate's share of the total PGA gas consumed by all Rates during calendar years 1999-2002. Each Rate's allocation should be divided by the total number of customer accounts (both sales and transportation) receiving service under that Rate on the date the Commission's Order is entered. Refunds to all Rates should be provided to both sales and transportation customer accounts.

[7] RESA/IGS Ex. 1.0, Agreed Stipulation of Facts Between Nicor Gas and the Retail Energy Supply Association, p. 2.
[8] *Id.*

VII. THE COMMISSION IS NOT REQUIRED TO UTILIZE PART 525 TO MAKE A REFUND IN THIS PROCEEDING.

Finally, in support of its recommendation that the Commission adopt Staff's refund method, the ALJPO states, "The Commission also notes favorably that Staff's proposed methodology is consistent with Part 525, which is applicable to PGA reconciliation cases." (ALJPO, p. 31) Indeed, Staff's proposed methodology's consistency with 83 Ill. Admin. Code Part 525 is the only basis for Staff's recommendation. In her rebuttal testimony, Staff Witness Mary Everson recommended that any refund in this proceeding be refunded to Nicor Gas' PGA customers through an Ordered Reconciliation Factor (Factor O) of Rider 6, Gas Supply Cost, of Nicor Gas Schedule of Rates. (*Id*.) During cross-examination, Ms. Everson stated: "It's my testimony that we follow the PGA rule, the Illinois Administrative Code Part [525.70] and the method—using that methodology for issuing a refund." (TR. 1297)

However, Ms. Everson's proposal is neither required, nor appropriate. The Commission has discretion to order a different refund method and has done so in the past. Moreover, due to the inequities of the Staff's proposed method, the Commission should utilize that discretion to order a refund payable to all Nicor Gas' customers, including transportation customers, in order to provide for equitable treatment of all customers.

The Commission has the discretionary authority to order a different, more equitable, refund. The Public Utilities Act mandates an annual PGA reconciliation, but does not specify the manner in which a refund is to be made. Section 9-220 (a) of the Act states, in pertinent part:

> Annually, the Commission shall initiate public hearings to determine whether the clauses reflect actual costs of…gas…purchased to determine whether such costs were prudent, and to reconcile any amounts collected with the actual costs of …gas…prudently purchased. (220 ILCS 5/9-220 (a))

Section 9-220 (g) of the Act provides the Commission with authority to promulgate rules relating to Section 9-220:

> The Commission shall have authority to promulgate rules and regulations to carry out the provisions of this Section.

Pursuant to Section 9-220 (g), the Commission adopted 83 Ill. Adm. Code Part 525, Purchased Gas Adjustment Clause. Though not specified in the Act, Section 525.70 (b) of the rules sets forth the refund methodology that is being recommended by Staff witness Everson in this proceeding. However, while the refund method outlined in Section 525.70 (b) is one way to handle the refund in this proceeding, it is not the only way. Because the refund method is not specified in the Public Utilities Act, but in the Commission's rules, the Commission has the authority to devise a different, more equitable, refund.

It is true that when an administrative agency adopts rules, it is generally bound by those rules and cannot disregard them arbitrarily or dismiss them in a discriminatory manner. (*Heaver v. Illinois Racing Board*, 103 Ill. App. 3d. 1020, 1025; 432 N.E. 2d 290 (1982)). However, as demonstrated in previously in this Brief on Exceptions, it is actually the application of Section 525.70 (b) that would result in discrimination—against transportation customers who were sales customers during the period 1999-2002. Moreover, the Court held in the same case that even if there were a violation of administrative rules, any such violation which does not prejudice the plaintiff and has no effect on the issues involved may be disregarded. (*Id*., p. 1026) Again, in the instant proceeding, prejudice would result from the application of the rule, not by establishing a refund using a different, more equitable, method of refund than that in the rule.

In fact, not only does the Commission have the authority to issue a refund in a manner other than set forth in 83 Ill. Admin. Code Part 525, the Commission has utilized that authority in

appropriate circumstances. In Ill. C. C. Docket 01-0707, involving The Peoples Gas Light and Coke Company, the Commission did not direct that the refund resulting from its Order in that proceeding be done in accordance with 83 Ill. Admin. Code Section 525.70. Instead, the Commission directed, out of a refund of $96 million based on a non-unanimous settlement, each residential customer (Service Classification No. 1), whether a sales customer or transportation customer, receive $100. (Order in Ill. C. C. Docket 01-0707, Order dated March 28, 2006, p. 6) The remaining amount of the $96 million was allocated to all other Service Classifications based on their share of the total PGA gas consumed by those Service Classifications during the 2001 through 2004 reconciliation periods. (*Id*.)

Similarly, in Ill, C. C. Docket 01-0706, involving North Shore Gas Company, the Commission did not direct that the refund resulting from its Order in that proceeding be done in accordance with Section 525.70 (b). Instead, the Commission directed that a refund of $4 million be divided among the service classifications on the basis of gas usage during the reconciliation periods in question. There was no distinction between North Shore Gas Company's sales customers and its transportation customers. (Order in Ill. C. C. Docket 01-0706, Order dated March 28, 2006, p. 6)

VIII. REQUEST FOR ORAL ARGUMENT

Pursuant to 83 Ill. Admin. Code Section 200,850, RESA and IGS request oral argument in this proceeding on the issue of the proper refund method. This is an important issue because the Staff's refund method adopted by the ALJPO would result in sales customers during the periods covered by this proceeding who subsequently switched to transportation service not receiving any refund. RESA believes that oral argument on this issue would be beneficial to the Commission.

IX. CONCLUSION

In conclusion, the Commission should not accept the refund method proposed by the Commission Staff. While such a method may be appropriate for a typical PGA reconciliation case, the instant proceeding is far from being a typical PGA reconciliation case. Limiting potential refunds to sales customers at the time of any refund would be unjust and inequitable to transportation customers, many of whom were sales customers at the time periods covering by these consolidated proceedings. RESA and IGS recommend that any refund ordered in this proceeding be made to all of Nicor Gas' customers, whether they are sales customers or transportation customers, in the manner set forth in Section IV, *supra*.

Dated: November 28, 2012

Respectfully submitted,

Retail Energy Supply Association
Interstate Gas Supply of Illinois, Inc.

By: /s/Gerard T. Fox
Gerard T. Fox

Law Offices of Gerard T. Fox
Two Prudential Plaza
180 N. Stetson Street
Suite 3500
Chicago, IL 60601
(312) 268-5674
gerardtfox@aol.com

NOTICE OF FILING

Please take note that on November 28, 2012, I caused to be filed via e-docket with the Chief Clerk of the Illinois Commerce Commission, the attached Brief on Exceptions of the Retail Energy Supply Association and Interstate Gas Supply of Illinois, Inc. in this proceeding.

Dated: November 28, 2012

/s/Gerard T. Fox
Gerard T. Fox

CERTIFICATE OF SERVICE

I, Gerard T. Fox, certify that I caused to be served copies of the foregoing Brief on Exceptions of the Retail Energy Supply Association and Interstate Gas Supply of Illinois, Inc. upon the parties on the service list maintained on the Illinois Commerce Commission's eDocket system for the instant docket via electronic delivery on November 28, 2012.

/s/ Gerard T. Fox
Gerard T. Fox