STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On its Own Motion Northern Illinois Gas Company d/b/a NICOR Gas Company Reconciliation of Revenues collected under Gas Adjustment Charges with Actual Costs Prudently incurred	)))))))))	Docket No. 01-0705
Illinois Commerce Commission On its Own Motion 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	))))))))	Docket No. 02-0067
Illinois Commerce Commission On its Own Motion Northern Illinois Gas Company d/b/a NICOR Gas Company Reconciliation of Revenues collected under Gas Adjustment Charges with Actual Costs Prudently incurred	)))))))))	Docket No. 02-0725

INITIAL BRIEF OF
THE RETAIL ENERGY SUPPLY ASSOCIATION
AND INTERSTATE GAS SUPPLY OF ILLINOIS, INC.

I. INTRODUCTION

Pursuant to 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 Initial Brief in this proceeding. This Initial Briefs follows the common outline agreed upon by the parties in this proceeding.

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

[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.

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 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)

RESA and IGS object to the refund mechanism proposed by Ms. Everson. For the reasons cited in this Brief, the refund should be made to all customers of Nicor Gas, including transportation customers.

III. CONTESTED ISSUES

L. REFUND ALLOCATION--THE COMMISSION IS NOT REQUIRED TO UTILIZE FACTOR O TO MAKE A REFUND IN THIS PROCEEDING.

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 for the following reasons. First, the nature of the $64 million refund does not fall within the meaning of Section 525.70. Second, even if the $64 million refund did fall within the meaning of Section 525.70, the Commission has discretion to order a different refund method and has done so in the past. Third, 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.

1. The $64 million refund does not fall within the meaning of Section 525.70.

RESA and IGS acknowledge that under the Commission's rules relating to the operation of gas charges, 83 Ill. Admin. Code Part 525 (Purchased Gas Adjustment Clause), refunds resulting from a PGA reconciliation case would normally flow through the gas charge to sales customers only, as proposed by Ms. Everson. Specifically, under Part 525, refunds are covered by Section 525.70, Annual Reconciliation. Section 525.70 (a) requires an annual reconciliation proceeding. Section 525.70 (b) provides for the possibility of refunds at the conclusion of that proceeding:

> If, after hearing, the Commission finds that *the utility has not shown all costs to be prudently incurred or has made errors in its reconciliation statement for such reconciliation year*, the difference determined by the Commission shall be refunded or recovered, as appropriate, under the Ordered Reconciliation Factor (Factor O), along with any interest or other carrying charge authorized by the Commission. (83 Ill. Admin. Code Section 525.70 (b), emphasis added)

However, under the Stipulation between the Commission Staff and Nicor Gas, the $64 million to be refunded is not an amount that represents imprudence, nor does it result from errors in the reconciliation statement for the reconciliation years in question. Rather, Nicor Gas and the Commission Staff entered into their Stipulation "in order to reduce the uncertainty of litigation, to conserve resources, to avoid or to reduce the scope and complexity of the issues between them, and to simplify the resolution of issues in the Consolidated Proceedings". (Stipulation Between Northern

Illinois Gas Company and the Staff Witnesses of the Illinois Commerce Commission, p. 2) Furthermore, the Stipulation states that "Nicor Gas and Staff agree that nothing in this Stipulation constitutes an admission of liability or fault on the part of Nicor Gas". (*Id*., p. 5)

Therefore, if the Commission enters an order based on the Stipulation, it will not have found that "the utility has not shown all costs to be prudently incurred or has made errors in its reconciliation statement for such reconciliation year". Thus, the refund mechanism is Section 525.70 (b) will not apply.

2. Even if the $64 million refund fell within the meaning of Section 525.70, or the Commission's Order finds imprudence on the part of Nicor Gas, the Commission has authority to order a different, more equitable, refund.

Even if the $64 million refund fell within the meaning of Section 525.70, the Commission has the discretionary authority to order a different, more equitable, refund. Moreover, it is possible that the Commission may not adopt the $64 million amount set forth in the Stipulation or, even if it does, the Commission may find imprudence on the part of Nicor Gas.[2]

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.

[2] RESA and IGS note that other parties, the Citizens Utility Board and the Attorney General, have recommended different refund amounts, apparently on the basis of imprudence on the part of Nicor Gas. RESA and IGS take no position on these recommendations, other than that any refund should be paid out to all customers, including transportation customers.

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 Section II (c) of this Initial Brief, 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.[3] 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)

3. The Commission should utilize its discretionary authority to order a refund payable to all Nicor Gas' customers, including transportation customers.

RESA and IGS would agree with the Commission Staff that its 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 2010 and a refund were going to be issued in calendar year 2011 or even 2012, Staff's proposed refund method would be both reasonable and equitable.

However, this case concerns the reconciliation of gas costs and gas charge revenues for the period of calendar years 1999 through 2002. At the earliest, any refund would be ordered during calendar year 2012. In this proceeding, directing a refund to the customers of Nicor Gas who are

[3] There was an exception for Service Classification No. 3, Large Volume Service, and No. 4, Large Volume Demand Service, which were based on each customers gas usage during the reconciliation periods. (Order in Ill. C. C. Docket 01-0706, Order dated March 28, 2006, p. 6)

sales customers at a point in time in calendar year 2012 or later 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.

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.[4] 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.[5] 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.[6]

During the cross-examination of Ms. Everson, the inequity of her proposed refund method for transportation customers was brought to light. 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 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

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

[5] *Id.*

[6] *Id.*

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)

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 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.

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 $64 million refund (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.[7]

IV. 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 II (C), *supra*.

Dated: April 6, 2012

Respectfully submitted,

Retail Energy Supply Association
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[7] 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 ICEA are not proposing such an exception in this proceeding.

NOTICE OF FILING

Please take note that on April 6, 2012, I caused to be filed via e-docket with the Chief Clerk of the Illinois Commerce Commission, the attached Initial Brief of the Retail Energy Supply Association and Interstate Gas Supply of Illinois, Inc. in this proceeding.

Dated: April 6, 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 Initial Brief 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 April 6, 2012.

/s/ Gerard T. Fox
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