

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Northern Illinois Gas Company	:	
d/b/a Nicor Gas Company	:	
	:	
Proposed general increase in	:	ICC Docket No. 04-0779
rates, and revisions to other terms	:	
and conditions of service	:	

**STAFF OF THE ILLINOIS COMMERCE COMMISSION'S
MOTION TO STRIKE ALL OR PORTIONS OF THE PRE-FILED
REBUTTAL TESTIMONY OF MYRA KAREGIANES**

The Staff of the Illinois Commerce Commission (“Staff”), by and through its undersigned attorneys and pursuant to Sections 200.190 and 200.680 of the Commission’s Rules of Practice, 83 Ill. Adm. Code 200.190 and 200.680, hereby moves to strike all or portions of the rebuttal testimony of Myra Karegianes filed on behalf of Northern Illinois Gas Company (“Nicor”). In support of this motion, Staff states as follows:

1. On April 5, 2005, pursuant to the procedural schedule established in this docket, Nicor prefiled the rebuttal testimony of Myra Karegianes. Nicor Gas Exhibit No. 28.0. As set forth in the background section of her testimony, Ms. Karegianes is a licensed attorney currently engaged in the private practice of law. In addition, from 1993 to 2002, Ms. Karegianes was employed by the Illinois Commerce Commission (“Commission”) in the position of General Counsel. Nicor Gas Exhibit 28.0, p. 2, lines 28-38. The stated purpose of Ms. Karegianes’ testimony is to respond to the direct testimony of Staff witness Gene Beyer. Nicor Gas Exhibit 28.0, p. 1, lines 7-12. Mr. Beyer testified that the Commission should continue to use a 30-year period for

purposes of weather normalizing test year billing determinants instead of adopting Nicor's proposal to use a 10-year period, and further recommended that the Commission further consider basis for determining normal weather by initiating a separate proceeding in which input from all natural gas and electric utilities can be evaluated. ICC Staff Ex. 9.0, pp. 1-2. Mr. Beyer explained that one of the reasons for his recommendation was the potential effect of such a ruling on customers and other utilities, and the need from a policy perspective of obtaining input from other interested parties before changing the longstanding practice of using a 30-year period to determine normal weather. *Id.* at 2-4.

2. Ms. Karegianes' rebuttal testimony is objectionable and should be stricken because it contains impermissible expert opinion testimony. The most significant and pervasive problem with Ms. Karegianes' rebuttal testimony is that it constitutes impermissible expert legal opinion testimony. Such "testimony" constitutes little more than legal argument that may be appropriate for inclusion in briefs, but does not constitute appropriate expert opinion testimony. For the reasons more fully discussed below, the impermissible portions of Ms. Karegianes' testimony should be stricken from the record in this case. When the inappropriate portions of Ms. Karegianes' testimony are removed, all that remains is a description of her background/qualifications and summaries of Staff testimony that will be part of the record in this proceeding. Although such remaining testimony may be admissible when supporting other testimony, it is duplicative and adds nothing to the record on a stand alone basis – and as such should also be stricken.

I. Ms. Karegianes' Rebuttal Testimony Constitutes Impermissible Expert Legal Opinion Testimony

3. It is a well settled proposition that the rules of evidence generally prohibit the introduction of expert legal opinion testimony:

. . . Because expert opinions on purely legal questions of American law are not admissible for any purpose, Professor First's declaration is hereby stricken. See *In re Initial Public Offering Sec. Litig.*, 174 F. Supp. 2d 61, 63 (S.D.N.Y. 2001) ("The rule prohibiting experts from providing their legal opinions or conclusions is 'so well-established that it is often deemed a basic premise or assumption of evidence law -- a kind of axiomatic principle.'" (quoting Thomas Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 U. Kan. L. Rev. 325, 352 (1992))).

United States v. Bodmer, 342 F. Supp. 2d 176, 182, fn. 7 (S.D.N.Y. 2004). Illinois courts follow this general rule excluding the introduction of expert legal opinion testimony. In *Mache v. Mache*, 218 Ill. App. 3d 1069 (1st Dist. 1991), the Court explained the general standard applicable to expert opinion testimony in Illinois:

The modern standard of admissibility of expert testimony is whether the testimony will aid the trier of fact in its understanding of the facts presented at trial. (*Johnson v. Commonwealth Edison Co.* (1985), 133 Ill. App. 3d 472, 482, 478 N.E.2d 1057.) While an expert may express an opinion on an ultimate issue, expert opinions are generally not admissible on matters of which the trier of fact is knowledgeable unless the subject is difficult of comprehension and the testimony will aid the trier of fact in understanding it. (*McCormick v. McCormick* (1988), 180 Ill. App. 3d 184, 205, 536 N.E.2d 419.)

Id. at 1077. Applying this standard, the Court in *Mache* held that proposed testimony, which applied facts to the relevant law, constituted a legal opinion that did not touch upon matters beyond the understanding or comprehension of the trial court and was properly excluded:

A review of the offer of proof contained in the record reveals that Dr. Braun merely applied the facts of the case to the relevant law and opined that Gerhard was in a dependent relationship with Anna and that she exerted undue influence over him with regard to the transfers of funds. In essence, the proposed testimony constituted nothing more than a legal

opinion and did not touch upon matters beyond the understanding or comprehension of the court. The trial court is allowed wide discretion in determining the admissibility of such testimony, and we find no abuse of that discretion in the instant cause.

Id. The decision in *Mache* is particularly relevant in the context of Commission proceedings because – similar to Commission proceedings where decisions are made by the administrative law judges and commissioners -- that case involved a decision where the judge – rather than a jury -- was the trier of fact. *Id.* at 1070, 1074 (Ruling upholding exclusion of legal opinion testimony in an appeal from a denial of a preliminary injunction upon a ruling by the trial court on a motion for a directed finding.).

4. Application of the above-described expert opinion testimony standard to the case at hand shows that the sum and substance of Ms. Karegianes' rebuttal testimony is impermissible expert legal opinion testimony. Ms. Karegianes makes clear that her testimony presents and is based on legal principles and opinions starting with the general statement of her conclusions regarding Staff's recommendation. Nicor Gas Exhibit 28.0, lines 13-25. Ms. Karegianes' summary of her conclusions leaves no doubt that she is offering her opinion regarding what the Commission **must** or **cannot** do in this proceeding, engaging in statutory construction or otherwise applying her view of the facts to the law:

The Illinois Commerce Commission ("Commission") **must address** the issue of using a 10-year average in this rate case. It **cannot** defer the issue to a rulemaking or other proceeding and by default use a 30-year average in this rate case because: (1) the "practice" of using a 30-year average is **not based on a duly promulgated Rule under the Illinois Administrative Procedure Act ("IAPA")**, and although it has been used in electric and gas utility rate cases in the past, it has not, in those cases, been challenged by the gas or electric utilities; (2) an issue in a rate case **must be decided** on the evidence in the record of that case, even if the disposition of the issue in that rate case deviates from past practice or is subsequently used in other utility rate cases; and (3) deferring the issue of a 10-year average from this rate case would deny Northern Illinois Gas

Company d/b/a Nicor Gas Company (“Nicor Gas”) and its customers just and reasonable, cost-based rates.

Id. (Emphasis added).

5. Although the basis for Ms. Karegianes’ mandatory directives to the Commission are not spelled out in each and every occasion, those that are explained have an asserted legal basis and the lack of any non-legal basis in her testimony (combined with Ms. Karegianes’ legal background and qualifications) leaves no doubt that the other asserted requirements, limitations and restrictions are also based on legal principles and/or legal opinions. Ms. Karegianes’ rebuttal testimony cannot be interpreted or characterized as anything other than legal opinion testimony and represents an attempt by Nicor to gain an extra opportunity to tell the Commission what it believes the Commission can or cannot do and – to the extent Nicor sees any room for Commission discretion – what the Commission should do based on Ms. Karegianes’ application and interpretation of testimony provided by other witnesses. Such testimony is improper for the reasons discussed above and should be stricken. Putting aside the question of whether such opinions have any merit, the proper place to present such arguments is in briefs – not testimony. Indeed, were it not for the absence of appropriate citations to legal authority, where it exists, Ms. Karegianes testimony would be, and likely will be, more appropriately found in Nicor's pleadings in this case.

6. The general description of Ms. Karegianes’ conclusions shows that her testimony is impermissible expert legal opinion testimony. Like the testimony in the *Mache* decision discussed above, legal opinion testimony regarding the authority of the **Commission** and what it can or cannot do in a **Commission** proceeding is obviously not testimony upon matters beyond the understanding or comprehension of the

Commission. Similarly, the Commission does not need expert testimony that does no more than present Ms. Karegianes' opinion regarding the application of facts to the law. Accordingly, Ms. Karegianes' testimony constitutes impermissible expert legal opinion testimony and should be stricken. As would be expected, Ms. Karegianes' detailed testimony is consistent with her summary and likewise presents impermissible expert legal opinion testimony. That testimony will be reviewed in more detail below.

7. At lines 103-111 of her rebuttal testimony¹, Ms. Karegianes presents her interpretation and characterization of the evidentiary record in this proceeding. Ms. Karegianes' interpretation of evidence provided by other witnesses and suggestion as to how the Commission should view that evidence is improper expert opinion testimony as explained above.

8. At lines 149-178 of her rebuttal testimony, Ms. Karegianes presents her construction of the Illinois Administrative Procedures Act. Testimony presenting such statutory construction or interpretation has long been recognized by Illinois courts as a violation of the general prohibition against expert legal opinion testimony:

Expert testimony concerning statutory interpretation is not proper, even if the witness is an attorney. See *Christou v. Arlington Park-Washington Park Race Tracks Corp.*, 104 Ill. App. 3d 257, 432 N.E.2d 920, 60 Ill. Dec. 21 (1982). Therefore, we agree with the defendants that it was not necessary or proper for the court to allow expert testimony concerning the proper interpretation of Oregon law.

Magee v. Huppin-Fleck, 279 Ill. App. 3d 81, 86 (1st Dist 1996). Ms. Karegianes' interpretation and application of the evidence to her statutory interpretation, as well as her statement regarding what "[t]he Commission must consider", are similarly improper.

¹ Attached to this motion as Attachment A is a copy of Ms. Karegianes' rebuttal testimony with the lines specifically referenced in this motion shown as strikeout text. Attachment A is provided for the benefit of the Administrative law Judges and the Commission.

Nicor Gas Exhibit 28.0, line 167. Moreover, Ms. Karegianes' testimony as to her opinion regarding possible findings on appeal and the scope of the Commission's authority clearly presents improper legal opinion testimony that should be stricken. *Id.* at lines 170-172, 175-178.

9. At lines 179-212 of her rebuttal testimony, Ms. Karegianes continues to address the "authority" of the Commission and offers her opinion as to what the Commission "must" or is "required" to do. Ms. Karegianes further presents her interpretations of other witnesses' testimony, and her opinion of how the Commission must apply that testimony. In the paragraph beginning on line 197, Ms. Karegianes presents her views and opinions as to "burden of proof" and "prima facie case", and interprets the evidence in this proceeding under those legal standards. As fully explained above, such legal opinion testimony is improper as expert opinion testimony.²

10. At lines 213-224 of her rebuttal testimony, Ms. Karegianes continues to explicitly address legal concepts. Here, Ms. Karegianes addresses the concept of *res judicata* and explicitly opines that the Commission is "not subject to *res judicata*." *Id.* at line 218. Although it is not unusual for the Commission to allow testimony from non-

² Even if presented in briefs and accepting, *arguendo*, Ms. Karegianes' characterization of the testimony, the indication that the Commission is bound to a particular result if expert opinion testimony is not explicitly countered is not correct. While Staff intends to set forth its full argument in the context of its brief, Staff would note that case law holds that a court is free to evaluate the expert evidence presented and accept or reject it in whole or in part. *Prince v. Herrera*, 261 Ill. App. 3d 606, 633 N.E.2d 970, 199 Ill. Dec. 174 (1994). Further, a court need not accept the opinion of one expert, *even where that expert's testimony is not directly countered by the expert opinion of another*. *In re Marriage of Petraitis*, 263 Ill. App. 3d 1022, 1031-32, 636 N.E.2d 691, 201 Ill. Dec. 259 (1st Dist. 1993). Thus, the lack of a point for point counter by Staff or any Intervenor to the testimonies of Messrs Takle and Herrera with respect to 10-year average weather normalization proposal does not obligate the Commission to accept their proposal. Although this issue need not be resolved in connection with this motion, it illustrates that Ms. Karegianes' testimony is in fact legal opinion testimony that should be stricken.

legal experts to contain a statement of the witnesses understanding regarding the Commission's authority as an aid to understanding or interpreting the witness' technical or policy testimony, such testimony is not allowed with regard or for the purpose of proving or advocating the underlying legal concept. Ms. Karegianes' testimony explicitly addresses this legal concept on a stand alone basis unrelated to technical or policy testimony, is not offered as an aid to interpreting other legitimate testimony by Ms. Karegianes, and is offered by a witness whose qualifications are clearly legal in nature. Under these circumstances, such testimony is improper.

11. Ms. Karegianes continues to address the res judicata principle at lines 225-252 of her rebuttal testimony, but adds here her opinions regarding the Commission's "authority" and the "option[s]" available to it regarding the weather normalization issue. Ms. Karegianes further provides her opinion on whether the Commission is "required to have participation" from other utilities. *Id.* at lines 236-237. Ms. Karegianes also offers her view regarding whether her interpretation of the evidence supports her characterization of Staff's position. *Id.* at lines 250-252. Again, all of such testimony is improper legal opinion testimony as explained above.

12. At lines 253-265 of her rebuttal testimony, Ms. Karegianes continues to provide her view regarding the interpretation and application of other witnesses' testimony. This section of her testimony further continues to advise the Commission what she believes it "must" do in this proceeding. As explained above, such testimony is improper and should be stricken.

13. At lines 256-293 of her rebuttal testimony, Ms. Karegianes introduces two new legal concepts on which she offer her opinion – "the rule against single issue rate

making and . . . the rule against retroactive ratemaking.” As with the other legal concepts that Ms. Karegianes explicitly addresses in her testimony, her testimony in this regard is improper. Such testimony clearly provides legal arguments or opinion that may be suitable for legal briefs, but are clearly not appropriate as expert testimony. Staff would further note that these legal concepts are regulatory legal concepts familiar to the Commission, and as such Ms. Karegianes’ testimony does not touch upon matters beyond the understanding or comprehension of the Commission.

II. The portions of Ms. Karegianes’ testimony that present summaries of other Nicor testimony are not proper expert testimony.

14. Ms. Karegianes begins her testimony by essentially reiterating the pre-filed testimonies of Nicor witnesses Herrera (Nicor Gas Exhibit Nos. 15.0), Takle (Nicor Gas Exhibit Nos. 16 and 29.0), and Harms (Nicor Gas Exhibit No.17.0). Nicor Gas Exhibit 28.0, pp. 3-5 and 6-7, lines 66-102 and 126-148. Ms. Karegianes’ presentation in this regard is inappropriate for expert testimony. The modern standard of admissibility of expert testimony is whether the testimony will aid the trier of fact in its understanding of the facts presented at trial. *Johnson v. Commonwealth Edison Co.* 133 Ill. App. 3d 472, 482, 478 N.E.2d 1057 (1985). The above cited sections of Ms Karegianes’ testimony do nothing to aid the Commission in its understanding of the case as they are merely a summation of the previously filed testimonies of Nicor witnesses. The Commission is fully capable of reading and understanding Messrs. Herrera, Harms, and Takle’s testimonies as originally filed. For these reasons, lines 66-102 and 128-148 of Nicor Gas Exhibit 28.0 should be stricken.

15. Staff also notes that Ms. Karegianes’ testimony in this regard is inconsistent with the Administrative Law Judges’ rulings regarding panel testimony.

Administrative Law Judges Ruling, 04-0779 (April 12, 2005); Administrative Law Judges' Ruling, 04-0779 (April 20, 2005). With respect to panel testimony in this proceeding, the Administrative Law Judges have determined that it will not be allowed and that each witness must only sponsor the particular testimony of which he or she has personal knowledge. While not presenting panel testimony, Ms. Karegianes' detailed summation of other witnesses' testimony raises the same issues found problematic with respect to panel testimony. At the very least, Ms. Karegianes' testimony in this regard will create unnecessary confusion and difficulty regarding cross examination (i.e., potentially forcing the cross examination of Ms. Karegianes and the witness she summarizes).

WHEREFORE, for the foregoing reasons, Staff respectfully requests that the Commission:

1. Strike in its entirety the rebuttal testimony of Myra Karegianes;
2. In the alternative, Strike portions of the rebuttal testimony of Myra Kagegianes as indicated in Attachment A to this motion; and
3. Allow such other and further relief as this Commission deems appropriate.

Respectfully submitted,

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