

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

ILLINOIS COMMERCE COMMISSION,)	
On Its Own Motion)	
)	
-vs.-)	
)	DOCKET No. 01 - 0706
NORTH SHORE GAS COMPANY)	
)	
Reconciliation of revenues collected)	
under gas adjustment charges with)	
actual costs prudently incurred.)	

**REPLY OF STAFF WITNESSES
TO THE RESPONSE OF NORTH SHORE GAS CO. TO
THE MOTION TO STRIKE REPLY BRIEF AND TO DENY OTHER RELIEF**

NOW COMES the Staff Witnesses of the Illinois Commerce Commission ("Staff") by and through their attorneys and, pursuant to the scheduling order of the ALJ, presents this Reply to the Response of North Shore Gas Company to the Motion to Strike a portion of the Reply Brief of North Shore Gas Company ("North Shore") and to Deny the Request for administrative review and for an offer of proof contained in said Reply Brief.

North Shore claims in Par. 1 of its Response that:

"Staff's request is based upon the following: (a) North Shore did not ask the ALJ to take administrative notice of the gas charge data in this docket *after* the ALJ ruled in the Peoples Gas docket (No. 01-0707) that, at that time, she would not take administrative notice of the proffered evidence... "

Staff Motion is not based on the above but, on the undisputed fact in the record, that North Shore never asked for administrative notice at all. North Shore's Response fails to address what happened in this (#01-0706) proceeding.

North Shore in Pars. 2-3 of its Response attempts to combine two separate and unrelated rules. The Commission's Rules of Practice are generally structured in a format that follows the usual path of Commission proceedings.

The Administrative Notice provision (83 Ill. Adm. Code 200.640) is part of Subpart D, Hearing Procedure. It is not part of Subpart E, Post-Hearing Procedures, such as Briefs (83 Ill. Adm. Code 200.800). North Shore's failure to seek admission during the evidentiary proceedings makes this attempt to add to the evidence simply prejudicial and improper. 5 ILCS 100/10-40.

North Shore is attempting to substitute argument in a brief for proper presentation of expert testimony. This is clearly shown since 83 Ill. Adm. Code 200.640 (c) requires that Parties and Staff "be notified either before or during the hearing or otherwise of the materials noticed and shall be provided a reasonable opportunity to contest the material so noticed [5 ILCS 100/ 10-40]." 83 Ill. Adm. Code 200.640 does not contemplate on its face the presentation of evidence, through administrative notice, in a reply brief. North Shore's notice of its intent to seek administrative notice is irreparably inadequate. Staff does not have the opportunity to respond to or comment upon the data North Shore seeks to admit, nor can Staff respond to the arguments relying upon such data.

Taking the administrative notice issue as an evidentiary issue, as is stated in Subsection 200.640 (a), 83 Ill. Adm. Code 200.640 is subject to 83 Ill. Adm. Code 200. 610. 83 Ill. Adm. Code 200.610 (a) excludes irrelevant, immaterial or unduly repetitious evidence. In the absence of expert testimony setting forth the relevancy and materiality of these numbers to North Shore's PGA reconciliation

case, there is no showing that these numbers are admissible under 83 Ill. Adm. Code 200.610(a). Further, 83 Ill. Adm. Code 200.610(b) requires that Staff Witnesses' objection be made at hearing, which Staff can no longer do since the hearings are long closed. Once again this shows that these matters are to be taken prior to marking the record heard and taken and are not, as claimed by North Shore, something that first can be done in a post-hearing Reply Brief.

83 Ill. Adm. Code 200.875, although a post-hearing provision, is inapplicable on its face. Application of 83 Ill. Adm. Code 200.875 (a) requires a directive by the Administrative Law Judge for post-record data. The provision does not allow the parties to submit post-record data on their own volition. North Shore's reliance on 83 Ill. Adm. Code 200.875 (c) is misplaced because the late-filed exhibits mentioned in Subsection (c) are the post-record responses and replies of Subsection (a). See last sentence of 83 Ill. Adm. Code 200.875 (a) which requires that the post-record data responses and replies be incorporated into the record as late-filed exhibits.

The good cause for admission into evidence (83 Ill. Adm. Code 200.875(c)) shown by North Shore is that it failed to make any attempt to seek admission of these facts during the evidentiary proceedings and, therefore, seeks admission into evidence when the relevance and materiality of these facts cannot be challenged or even examined. This is not good cause, this is just a violation of the rules.

Allowance of North Shore's administrative notice request is unreasonable and is unsupported by the Commission's Rules of Practice. To allow such a

wholesale evisceration of the hearing process, which North Shore seeks, is to create chaos, wherein parties seek during the briefing of the case (or later) to patch-up inadequate evidentiary presentations by administrative notice of materials not shown relevant or material.

In Par. 4 of its Response, North Shore relies on *National Aircraft Leasing Ltd. v. American Airlines, Inc.*, 74 Ill. App. 3d 1014 (1st Dist., 1979), but that decision supports denial of administrative notice. In language virtually written for this case, the Court said:

“Judicial notice is an evidentiary concept which operates to admit matters into evidence without formal proof (Cook County Department of Environmental Control v. Tomar Industries, (1975), 29 Ill. App. 3d 751, 331 N.E.2d 196), but it should not be used by National as a means of evading its responsibility to prove the matters alleged in its pleadings. While National did put the court and American on notice that New York law should be considered, it offered the trial court no relevant provisions of that State's law until after judgment was entered. National's actions at trial having contradicted the notice that was provided by the pleadings, the notice of the applicability of New York law cannot be seen as reasonable under section 4j of the Uniform Judicial Notice of Foreign Law Act (Ill. Rev. Stat. 1977, ch. 51, par. 48j).”
74 Ill. App. 3d at 1017-8 (emphasis supplied)

In this cause and unlike the *National Aircraft Leasing* case, *supra*, North Shore provided no notice that it intended to seek administrative notice of these facts during the hearing and as required by 83 Ill. Adm. Code 220.640(c). It was North Shore's burden to prove the prudence of the GPAA. 220 ILCS 5/9-220(a). The new material is not responsive to Staff's testimony finding imprudence for

two transactions (December purchases and the GPAA), for in neither adjustment does the imprudence depend on the actual (after-the-fact) gas costs paid by other utilities in Illinois. The fact that judgment is not usually rendered at the end of a Commission proceeding does not support North Shore's claim of open-ended evidence production and admission during the time of briefing and, presumably, during exceptions to the Proposed Order.

Also in Par. 4, North Shore's reliance on *Muller v. Zollar*, 267 Ill. App. 3d 339, 341 (3rd Dist. 1994) is misplaced. Courts in administrative review cases do not make evidentiary findings or rulings. 220 ILCS 5/ 10-201(d); 735 ILCS 5/ 3-110. Materials of which a Court may take notice are to aid the Court's review, not to make evidentiary findings. *Illinois Bell Telephone Co. v. Illinois Commerce Commission*, 55 Ill. 2d 461, 468 (1973); *Muller, supra*, 267 Ill. App. 3d at 341. North Shore intends for the administrative notice of facts by the Commission, in this case, to change the evidentiary record before the decisionmaker. This is improper where North Shore bears the burden of proof. 220 ILCS 5/ 9-220 and 5 ILCS 100/ 10-40. North Shore could have easily provided notice prior to hearing if North Shore thought that these materials have some bearing on the prudence of the GPAA or its December 2000 purchases.

In Par. 5 of its Response, North Shore argues that, in this cause, comparison of gas costs of other utilities should be allowed. Staff wonders that, if North Shore's gas costs were much higher than other utilities during the reconciliation period, North Shore would admit a finding of imprudence merely because North Shore ended up paying more for gas during the reconciliation

period. The plain fact is that the results are not the proper proof of imprudence, especially in this case, and are merely an attempt to create, without supporting expert analysis, a hindsight analysis. *Illinois Power Co. v. Illinois Commerce Commission*, 245 Ill. App. 3rd 367, 374 (3rd Dist. 1993). North Shore has already presented its hindsight analyses in the record (Resp. Ex. F (FCG-RT) at 38-41).

The strategic alliance did not taint the GPAA. Staff argued that the alliance constituted the motive for the GPAA to be entered as it was by North Shore: in a short time, without consideration of any other supplier, with a significant amount of its annual gas purchases for five years, and without meaningful examination of the effects on ratepayers or with the ignoring of the only two studies done prior to entering the GPAA. Staff also analyzed the GPAA only to determine whether it raised gas costs (Staff Ex. 3 at 13-26 and Staff Ex. 7 at 11-29). Enron's involvement was not considered.

In any event, North Shore's arguments from Pars. 6-7 of its Response fails to show any need to examine the gas costs eventually experienced by other gas utilities during the reconciliation period in the context of a Section 9-220 reconciliation case. 220 ILCS 5/ 9-220. None of these arguments by North Shore depend on getting administrative notice or admission into the record of these retrospective gas costs.

WHEREFORE Staff respectfully requests that the identified portions of the Reply Brief of North Shore be stricken, that the requested administrative notice be denied, and that the offer of proof be denied as requested in Staff's Motion.

Respectfully submitted,

/s/ James E. Weging

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Dated: September 8, 2005

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NOTICE OF FILING

TO: Parties on Service List

PLEASE TAKE NOTICE that I have, on this 8th day of September, 2005 A.D., filed with the Chief Clerk of the Illinois Commerce Commission, the Reply of the Staff Witnesses of the Illinois Commerce Commission To The Response in Opposition of North Shore Gas Company to the Motion to Strike Reply Brief And To Deny Other Relief, a copy of which is hereby served upon you.

/s/ James E. Wegin

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of attached Notice, together with the Document referred to therein, was served on the parties shown on the service list by e-mail on September 8, 2005.

/s/ James E. Weging

JAMES E. WEGING

ICC Docket No. 01-0706

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