

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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

**RESPONSE OF STAFF OF THE ILLINOIS COMMERCE  
COMMISSION TO NORTHERN ILLINOIS GAS COMPANY'S  
EMERGENCY MOTION REGARDING COMPLIANCE TARIFFS**

The Staff of the Illinois Commerce Commission (“Staff”), by and through its undersigned attorneys and pursuant to the Administrative Law Judges’ (“ALJs”) Ruling dated October 5, 2005, hereby responds to Northern Illinois Gas Company’s (“Nicor” or the “Company”) Emergency Motion Regarding Compliance Tariffs (“Compliance Tariff Motion”) filed on October 5, 2005, as follows:

**I. Introduction**

1. Nicor’s Compliance Tariff Motion raises two narrow issues: (1) what is the proper interpretation of the final order (“Final Order”)<sup>1</sup> entered by the Illinois Commerce Commission in this docket; and (2) was the rejection of Nicor’s September 30, 2005, compliance filing consistent with the proper interpretation of the Commission’s Final Order. Nicor’s motion is not a debate about what the Commission’s Final Order **should** have found – which would be the proper subject of a petition for rehearing. Rather, the

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<sup>1</sup> The Commission entered a final order on September 20, 2005, and amended that order on September 28, 2005, regarding certain matters not relevant to the current dispute. Unless otherwise indicated, references to the Final Order will be to the Final Order as amended by the Commission’s September 28 order.

issue is what did the Commission's Final Order actually find and rule on the matters which were the basis for rejecting Nicor's September 30 compliance filing.<sup>2</sup> As explained in full below, Nicor's September 30 tariff filing was not in compliance with any reasonable construction of the Commission Final Order.

2. As a preliminary matter, Staff must note that its actions in connection with Nicor's compliance filings are not actions taken in Staff's advocacy role. Rather, Staff's role in reviewing compliance filings is an action taken on behalf of the Commission. The review of compliance tariff filings is, in part, a Commission consumer protection role long filled by Staff, generally through the Rates Department. Since Commission rate orders granting rate increases typically allow compliance tariff filings to take effect on much less than 45 days notice (here 2 days), it is critical that such tariff filings actually comply with the Commission's decision. This review process conducted by Staff, including rejection of non-compliant filings, helps ensure that the rates actually put in place on such short time frames are consistent with the rates ordered by the Commission. This process is not without benefits to utilities: the utilization of technical Staff to assure the Commission of compliance with its rate orders allows the Commission to order effective dates for the newly determined rates that are significantly shorter than would otherwise be the case (and which are shorter than the statutorily

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<sup>2</sup> The Notice of Administrative Law Judges' ("ALJs") Ruling issued October 5, 2005, sets a schedule for responses and replies, and also provides as follows: "In addition to addressing the contents of Nicor's Motion, Staff's Response shall fully explain its legal theories as to why Rate 4 is non-compliant or erroneous in the September 30 tariff filing, and what legal effect that its letter (issued by the Chief Clerk on October 3, 2005) has in the absence of an appropriate motion in this docketed proceeding." The second question item presented in the ALJs' Notice appears to raise an issue that was not raised in Nicor's Compliance Filing Motion. Rather, Nicor simply seeks a determination of whether the rejection was improper on the merits. Accordingly, Staff does not believe it is appropriate or necessary for the Commission to address this issue in ruling on Nicor's motion, particularly given the expedited response times mandated by the ALJs.

prescribed default effective date of 45 days applicable to any tariff filing “[u]nless the Commission otherwise orders”). (220 ILCS 5/9-201)

3. Nicor asserts and seeks a finding that the compliance tariffs filed by it on September 30, 2005 were in compliance with the Final Order, and that the compliance tariffs it filed on October 4, 2005 under protest<sup>3</sup> are not in compliance with the Final Order. (Compliance Tariff Motion, p. 1) Nicor further asks the Commission to direct the Chief Clerk to accept for filing the tariff sheets originally filed on September 30, 2005. *Id.* at 5. As will be explained below, Nicor’s interpretation of the Final Order is incorrect, the tariff sheets originally filed on September 30 were not in compliance with the Final Order, and the relief requested by Nicor should be denied.

**II. The Order Explicitly Increased Rate 1 Billing Determinants Without An Offsetting Decrease to Rate 4, and Nicor’s Contention That Such An Offset Should Be Implied Is Contrary to The Final Order, The Facts and The Law**

4. The underlying issue giving rise to this dispute is the effect of the Commission’s adoption in its Final Order of the position advocated by the Attorney General on behalf of the People of the State of Illinois (“AG”) that sales to residential customers (Rate 1 customers) should be adjusted upward from that which Nicor originally proposed. The Commission concurred with the AG’s argument and found that Nicor failed to justify its forecast decrease of 17,937,000 therms for residential customers. (Order Dated September 20, 2005, pp. 103-105)

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<sup>3</sup> Although it was always clear that Nicor’s interpretation of the Final Order was contrary to Staff’s, Nicor’s Compliance Tariff Motion is the first time that Staff was made aware that the tariffs filed by Nicor on October 4, 2005 were filed “under protest.”

5. The following quoted language constitutes all of the language contained in the Commission's September 20 Final Order (i.e., summary of positions, conclusions and ordering paragraphs) directly relevant to the Rate 1 billing determinants issue:

Nicor

...

... Finally, the Company contends that AG witness Efron proposes to alter the billing determinants for Rate 1, but has not sufficiently justified his proposal.

\* \* \*

AG

According to the AG, Nicor has forecast an increasing number of residential customers, but has forecast the sales to residential customers to decrease from 2004 to 2005. The AG asserts that sales to residential customers and the pro forma base rate revenues from sales to those customers should be adjusted.

The AG relies on a Nicor assumption that:

Customer additions were forecast to be 34,200 in 2005, of which 95.1 percent are expected to be residential, 4.7 percent commercial and .2 percent industrial. Delivery growth attributable to these anticipated new customers and commercial/industrial process changes is expected to more than offset a forecast load loss due to natural gas conservation.

(Nicor Sched. G-5 at 2.) The AG asserts that Nicor's assumption that growth attributable to new customers will more than offset load loss due to conservation efforts, conflicts with the Company's projected decrease in residential sales of 17,937,000 therms. (Nicor Sched. E-4.) Nicor noted business conditions, business closings and persons/entities moving out of the area as other possible reasons for declining sales, but the AG contends that these are not assumptions listed on Schedule G-5.

AG witness Efron forecasts growth in residential sales of 27,953,000 therms based on an assumption that the growth in sales from 2004 to 2005 will equal the weather normalized growth in sales from 2003 to 2004. The AG contends that Company witness Harms failed to explain his own forecast adequately or to rebut that of Mr. Efron.

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## Commission Analysis and Conclusion

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The Commission concurs with the AG that the Company failed to justify its forecast decrease of 17,937,000 therms. The Company contends that the AG's position is unsupported, but it fails to state why the analysis is incorrect. Accordingly, the Commission rejects Nicor's estimate of test year residential sales of 2,256,096,000 therms, and accepts the AG's estimate of 2,301,985,000 therms.

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## VII. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

...

- (11) the determinations regarding cost of service and rate design contained in the prefatory portion of this Order are reasonable for purposes of this proceeding; the tariffs filed by Nicor should incorporate the rates and rate design set forth and referred to herein; and

(Order dated September 20, 2005, pp. 103, 103-104, 105, 196)

6. Thus, the Commission's adoption of the AG's position resulted in the Order directing Nicor to increase the number of therms allocated to Rate 1 Customers. (Id., p. 105; Compliance Tariff Motion, p. 2) This is the complete extent of that ruling. Nowhere in the Final Order is there language indicating that there should be an adjustment to any other rate as a result of this ruling, or that this ruling is somehow an "allocation" requiring a corresponding adjustment to other unspecified rates. Indeed, the Final Order is devoid of any language even making this suggestion.

7. The tariffs filed by Nicor on September 30, 2005, complied with the Rate 1 billing determinants ruling by including Rate 1 rates based on the increased Rate 1 billing determinants advocated by the AG and accepted by the Commission. The effect

of this compliance adjustment was to decrease per unit rates for Rate 1 customers as the Rate 1 cost of service (i.e., the Rate 1 customer class' share of the revenue requirement) is now recovered through a larger number of billing units (therms). However, Nicor's September 30, 2005, filing contained an additional billing determinants adjustment which was the basis for Staff's determination that its filing was not compliant with the Commission's Final Order. That is, Nicor's September 30 filing included Rate 4 rates that were based on an adjustment to Rate 4 billing determinants (therms). Specifically, Nicor's September 30 filing included Rate 4 rates based on a decrease in Rate 4 billing determinants exactly equal to the increase in Rate 1 billing determinants, reducing total Rate 4 therms, based upon the record in the docket, from 864,150,000 therms (Nicor Gas Company Exhibit 44.4, page 3 of 26, line no. 24, column (C)) down to 818,261,000 therms (from Exhibit 13, page 1 of 4 in supporting calculations filed with rejected Nicor tariffs on September 30, 2005). The effect of this adjustment was to increase the per unit rates for Rate 4 customers and to increase revenues from revised base rates above the amount authorized in the Order.

8. Staff carefully reviewed the Rate 1 billing determinants ruling, the complete text of which is included above, and found no reference whatsoever to an offsetting adjustment to Rate 4 (or any other rate). Staff further reviewed the Commission's ruling with respect to Rate 4, which again contained absolutely no reference whatsoever to a Rate 4 billing determinants adjustment as a result of the Rate 1 adjustment. Staff determined, based on (i) the fact that the Commission's Final Order contained no provision whatsoever directing or providing for an adjustment to Rate 4 billing determinants and (ii) the fact that Nicor's September 30 filing contained – on its

face -- Rate 4 rates based on an adjustment to Rate 4 billing determinants, that the September 30 filing was not in compliance with the Final Order because it included a rate design adjustment that was neither allowed nor required by the Commission's Final Order.

9. Of course, Staff sought and received input from Nicor as to why its September 30 compliance tariffs contained an adjustment to Rate 4 that was not provided for in the Commission's Final Order. Nicor's response, which is not different from the underlying position advocated in its motion, was that an adjustment to Rate 4 billing determinants is **implied** in the Final Order. Nicor's reasoning was, and is, essentially the following: (1) The Final Order contains statements of revenues at current rates as well as a statement of the amount of the revenue increase (a calculation of the difference between the new revenue requirement approved by the Commission and the revenues at current rates) based on Nicor's original estimate of total therms (i.e., total billing determinants); (2) The inclusion of those numbers should be deemed to be an approval of Nicor's total therms; (3) Since Rate 1 therms were increased and total therms did not change, the Final Order must be read to require a reduction in therms to some other rate class; and (4) that Rate 4 is somehow the logical or appropriate place to make the offsetting adjustment. Nicor also suggested to Staff (or at least that is how Staff interpreted Nicor's communications) that the Commission approved Nicor's total therm estimate.<sup>4</sup> Staff found Nicor's argument to be unconvincing and unconvincing for multiple reasons.

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<sup>4</sup> This argument is apparently embodied in Nicor's statement that "[i]n its final Order, the Commission rejected the only challenge to Nicor Gas's calculation of its total therms." (Compliance Tariff Motion, p. 2) To the contrary, although the AG contested Nicor's estimate (continued...)

10. First and foremost, as noted above, the Final Order contains no explicit direction to adjust the billing determinants for Rate 4 -- or any other rate other than Rate 1. Orders are generally construed under the general rules of construction applicable to contracts or statutes. (See White v. Roughton, 689 F.2d 118, 120 (7<sup>th</sup> Cir. 1982), *citing* United States v. ITT Continental Baking Co., 420 U.S. 223, 238, 43 L. Ed. 2d 148, 95 S. Ct. 926 (1975) (“[A] consent decree or order is to be construed for enforcement purposes basically as a contract,’ so that ‘reliance upon certain aids to construction is proper, as with any other contract.’”)) Illinois courts have long held that the “primary rule of statutory construction is to give effect to legislative intent by first looking at the plain meaning of the language.” See e.g., Davis v. Toshiba, 186 Ill. 2d 181, 184-85 (1999). Where the statutory language is clear and unambiguous, moreover, “a court must give it effect as written, without reading into it exceptions, limitations or conditions that the legislature did not express.” *Id.* (Internal punctuation and citations omitted). A similar rule of construction is applied to contracts in Illinois:

An insurance policy is a contract, and the general rules governing the interpretation of other types of contracts also govern the interpretation of insurance policies. Accordingly, our primary objective is to ascertain and give effect to the intention of the parties, as expressed in the policy language. If the policy language is unambiguous, the policy will be applied as written, unless it contravenes public policy. Whether an ambiguity exists turns on whether the policy language is subject to more than one reasonable interpretation. Although "creative possibilities" may be suggested, only reasonable interpretations will be considered. Thus, we will not strain to find an ambiguity where none exists. Although policy terms that limit an insurer's liability will be liberally construed in favor of

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with respect to Rate 1 therms, the nature of the AG’s arguments – especially as described in the Final Order – are reasonably and fairly viewed as equally applicable to Nicor’s estimate of total therms. As will be explained below, Nicor disappointingly neglects to mention that the AG considered its argument concerning the understatement of Rate 1 therms to be equally applicable to total therms.

coverage, this rule of construction only comes into play when the policy is ambiguous.

(Hobbs v. Hartford Ins. Co., 214 Ill. 2d 11, 17 (2005) (internal citations omitted))

Consistent with the above-described rules of constructions, Staff's general approach to its review of tariff compliance filings is to rely primarily on the explicit language of the Commission's order. In general, if a particular change to the tariffs is not specified in the order, then the inclusion of such a change is properly viewed to be inconsistent with the order and should more appropriately be addressed through a petition for rehearing or other appropriate motion.

11. Although Nicor is correct that the Final Order contains a statement of revenues at current rates as well as a statement of the amount of the revenue increase – which numbers were based on Nicor's original estimate of total therms -- Staff did not find it appropriate to view this aspect of the Final Order as an indication that the Commission decided or determined (i) that total therms would, should or must remain the same notwithstanding its ruling to explicitly increase Rate 1 therms or (ii) that an adjustment to some other rate was required or appropriate as a result of the Rate 1 ruling. Nicor's interpretation of the intent of the Final Order is based totally on conjecture, and as such is inappropriate and incorrect.

12. Second, Nicor's reliance on the Final Order's statement of revenue at current rates and the amount of revenue increase over current rates elevates what are essentially informational numbers to substantive findings on their component factors as well as every element of their underlying calculations. Statements of revenue at current rates and the amount of the revenue increase over current rates present useful and relevant information, but changes in those numbers do not impact the

Commission's determination of the utility's revenue requirement – which is the critical number in deciding a rate case and determining revised base rates. Staff does not dispute that Nicor has identified a technical inaccuracy in some of the numbers presented in the Final Order, but the “numbers” Nicor points to and relies upon in no way detract from the Commission's determination of an appropriate revenue requirement or render that determination inaccurate. In Staff's view, it would be inappropriate to use such remote, removed and non-essential numerical inconsistencies to read into an order an implied requirement or authorization to make an unspecified rate adjustment.

13. Moreover, contrary to Nicor's suggestion, the Commission's ruling on weather normalization can hardly be seen as a specific endorsement of Nicor's estimate of total therms. (See Compliance Tariff Motion, p. 2) At the referenced section of the September 20, 2005, Final Order, the Commission concludes that weather normalization of sales should be based upon a 10-year analysis period rather than a 30-year period. Other than the fact that weather normalization applies to all test year sales, this issue and the Commission's determination of this issue have no direct bearing on the appropriateness of Nicor's total therm estimate. The Commission's resolution of the weather normalization issue has nothing to do with Nicor's unilateral and ultra vires reduction of test year therms delivered under Rate 4. Furthermore, the Final Order appears to view the AG's argument as applicable to Nicor's forecast of total therms. As noted in the Final Order's summary of the AG's position, the AG's adjustment relies on Nicor's assumption with respect to its total customer additions forecast, and finds fault with those underlying assumptions:

The AG asserts that Nicor's assumption that growth attributable to new customers will more than offset load loss due to conservation efforts, conflicts with the Company's projected decrease in residential sales of 17,937,000 therms. (Nicor Sched. E-4.) Nicor noted business conditions, business closings and persons/entities moving out of the area as other possible reasons for declining sales, but the AG contends that these are not assumptions listed on Schedule G-5.

AG witness Effron forecasts growth in residential sales of 27,953,000 therms based on an assumption that the growth in sales from 2004 to 2005 will equal the weather normalized growth in sales from 2003 to 2004. The AG contends that Company witness Harms failed to explain his own forecast adequately or to rebut that of Mr. Effron.

(Order dated September 20, 2005, pp. 103-105) From this language, it appears to Staff that the AG's adjustment based on a particular defect applicable to residential sales was viewed by the Commission as equally applicable to total sales. Under these circumstances, it would not be reasonable for the Commission's Final Order to be interpreted as endorsing Nicor's estimate of total terms, and Nicor's arguments about what should be implied from the Final Order fall flat. It is not Staff's role in reviewing compliance filings to make a determination as to what the Final Order should have found. The task is to determine what the Commission's order did find based on a reasonable reading of the order. The fact that Nicor's argument depends on its assertions regarding conclusions that it believes should have been made from the evidence (Compliance Tariff Motion, p. 3, fn. 3) speaks volumes to the fact that Nicor's argument rests not on an interpretation of the Final Order but instead upon a non-existent amendment or modification to the Final Order. It would be inappropriate and improper to amend or modify the Final Order under the guise of a "compliance filing" – even if it would be appropriate to amend the order on a proper motion.

14. Finally, even if one accepts Nicor's faulty reasoning that the Final Order should be read to imply an unstated requirement or authorization to offset the explicitly

stated Rate 1 billing determinants increase, Nicor's argument necessarily requires a determination of where and how to implement such an offset. Although Nicor attempted to justify to Staff why it would be appropriate to make such an adjustment to Rate 4, its motion is essentially silent on this issue. Of course, the Final Order is totally silent with respect to the issue of where such an offset should be made. Even assuming, *arguendo*, that it would be appropriate on the merits to make such an offset to Rate 4, it is clear that what is at issue is a new ruling or determination not contained in the Final Order. This aspect of Nicor's argument demonstrates yet again that Nicor's argument is not based on a reasonable interpretation of the Final Order, but rather on an amendment or modification of that order. Under these circumstances, Staff was and is both compelled and justified in concluding that Nicor's September 30 tariff filing was not in compliance with the Commission's Final Order, and that tariff was properly rejected on that basis.

15. Further, it is not apparent to Staff that the record in this proceeding could support Nicor's proposal to reduce therms delivered under Rate 4 as a result of the Commission's conclusion that Nicor's projection of therms delivered under Rate 1 should be increased. Nicor's proposal necessarily assumes a cause and effect relationship between Rate 1 natural gas usage and Rate 4 gas usage. To Staff's knowledge, nowhere in Nicor's testimony did it show how an increase in therms delivered to Rate 1 customers would cause a reduction in therms delivered to Rate 4 customers. Because the record is devoid of any such cause and effect relationship, there does not even appear to be substantial evidence from which such a determination

could be made. Thus, Nicor's proposal – in addition to its other deficiencies – does not appear supportable on the current record.

16. Although Staff's determination that Nicor's September 30 filing was non-compliant is amply supported by the foregoing analysis, consideration of filings by Nicor and the AG provided even further support for Staff's conclusion that the Commission did not intend for its Final Order to have the implied requirement advocated by Nicor. In its Brief on Exceptions, Nicor explicitly addressed the issue of an offset if the Commission continued the Proposed Order's conclusion to grant the AG's Rate 1 adjustment:

While there are more reasons, discussed below, that Mr. Effron's proposed adjustment is wrong and should be rejected, Nicor Gas stops here to note that the three foregoing points mean that there is no valid basis in the record for rejecting its forecast of total sendout, and thus, if Mr. Effron's proposed adjustment to the Rate 1 sendout were to be approved, then the Proposed Order also should approve an offsetting decrease of the sendout for non-residential customers in the same amount of therms. (E.g., Nicor Gas Rep. Br. at 143; Harms Sur., Nicor Gas Ex. 44.0, 29:640-651) No result other than approval of Nicor Gas' forecasted total therms would be consistent with the evidence in the record.

(Northern Illinois Gas Company Brief on Exceptions ("Nicor BOE"), p. 72) Nicor's Brief on Exceptions contained further extensive arguments regarding how total sendout and Rate 1 sendout were derived, and contended, *inter alia*, that those derivations rendered Mr. Effron's adjustment inappropriate. (Id., pp. 71-75) Nicor concluded by specifically requesting the Commission to reject the AG's proposed adjustment accepted in the ALJs' Proposed Order, or in the alternative to rule that there should be an offset to non-residential therms:

The AG's proposed adjustment to the Rate 1 billing determinants is without merit. Nicor Gas has proposed appropriate revised language rejecting that adjustment in its Exception No. 036. In the alternative, as the above discussion indicates, even if the proposed adjustment were to be approved, then there still would be no basis for adjusting total sendout, and the increased residential therms should be exactly offset by reduced

non-residential therms. Therefore, Nicor Gas has proposed appropriate alternative revised language in its Exception No. 039.

(Id., p. 75)<sup>5</sup>

17. The request to rule that an offset should be made could not have been more clearly placed before the ALJs and the Commission, yet the Commission declined to make such a ruling as the Final Order is absolutely devoid of any such ruling. To the extent that Nicor's argument is that the Final Order is somehow ambiguous and other evidence beyond the language of the Final Order should be considered to discern its intent, that evidence (in the form of filed pleadings) is contrary to Nicor's position.

18. The conclusion reached by Staff is even more unavoidable when one considers that the "offset" request was, in fact, a highly contested issue.<sup>6</sup> The AG in its Reply Brief on Exceptions specifically contested Nicor's assertions regarding total therms and the appropriateness of an offset:

First, Nicor Gas states, "the evidence is uncontradicted that Nicor Gas forecasts normal degree days and *total* sendout for all end-user customers, *before* making any allocations between sales, traditional transportation, and Customer Select customers, and before any allocations by rate and revenue class." NG BOE at 72 (emphasis in original). This statement is irrelevant to the question at hand. What is uncontradicted is that Nicor Gas conducted forecasts, and these forecasts produced Nicor Gas' proposed number of normal degree days and Nicor

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<sup>5</sup> As required by the Commission's rules, Nicor proposed specific language to implement its alternative exception to provide an offset to non-residential therms: "The Commission finds that the AG has justified its forecast, however the increase residential therms should be exactly offset by reduced non-residential therms." (Nicor BOE, Exhibit 1, p. 114, Exception 39)

<sup>6</sup> Nicor makes the misplaced and inappropriate argument, presumably to demonstrate that Staff's conclusion on the offset issue is somehow specious, that Staff was silent on the offset issue after Nicor raised it in its Brief on Exceptions. (Compliance Tariff Motion, p. 4). Nicor's facts are correct, but its argument is pointless. Nicor's argument is totally misplaced in that Staff's review of compliance tariffs is not conducted in its advocacy role. When reviewing compliance tariffs Staff is acting on behalf of the Commission. Nicor's argument is highly inappropriate, if not misleading, because it fails to mention that its BOE arguments on the offset issue and total therms were, as will be reviewed below, highly contested by the AG.

Gas' proposed total sendout for all end-user customers. **This statement says nothing about whether those proposed figures were reasonable or whether the alternative being proposed is sound.**

Second, Nicor Gas states, "as the Proposed Order recognizes, the evidence also is uncontradicted in support of Nicor Gas forecast of normal degree days, which the Proposed Order approves." NG BOE at 72. This statement is also irrelevant. The PO's adoption of the adjustment to residential sales proposed by the AG does not depend on the number of normal degree days approved.

Third, Nicor Gas states, "the evidence also is uncontradicted in support of Nicor Gas forecast of total sendout." NG BOE at 72 (emphasis in original). **This statement is false.** Company Workpaper, WP E-4, page 2, which shows actual therm sales for 2003 and forecasted sales for 2004 and the 2005 test year, indicates sales decreasing from 4,908,032,000 therms in 2004 to 4,793,671,000 therms in 2005. **This forecast sendout for 2005, which Nicor Gas reflects in its test year billing determinants, is clearly inconsistent with the Company's own stated assumptions regarding the volume of test year sales.**

The Company's Part 285 filing Schedule G-5, which is a description of the assumptions used in the forecast of test year rate base, revenues, and expenses, states on Page 2 that "the delivery growth attributable to new customers and process changes is expected to more than offset a forecasted load loss due to natural gas conservation."<sup>[fn]</sup> **Read in context, it is obvious that this assumption refers not just to growth in residential sales, but to growth in total sales.** See NG 285 filing, Sch. G-5 at 2. In other words, these assumptions indicate an increase in test year sales from 2004. Thus, the Company's forecasted decrease in sales in the 2005 test year is contradicted not only by evidence produced by the AG but also by the Company's own stated forecast assumptions.

**The Company's alternative of offsetting the AG adjustment to residential sales with a decrease in sales to other customer classes is also without merit, as doing so would violate the Company's own stated assumptions that "the delivery growth attributable to new customers and process changes is expected to more than offset a forecasted load loss due to natural gas conservation."** NG 285 filing, Sch. G-5 at 2. Indeed, Nicor Gas fails to provide any description of how such an offsetting adjustment could be accomplished, and, in violation of Part 200.830(b)(2) of the Commission rules, Nicor Gas fails to provide replacement language for this alternative.

Fourth, Nicor Gas states, "the evidence is uncontradicted that Nicor Gas engaged in a detailed process to allocate the *total* sendout among sales, traditional transportation, and Customer Select customers, and then

further by rate and revenue class, taking into account, among other things, historical data, new customer additions, a forecast of new services, status changes among larger transportation customers, numbers of customers in each category, and base use per customer.” NG BOE at 72-73 (emphasis in original). **This statement is also irrelevant to the issue at hand. Once again, all that this statement offers is that no party contradicted the fact that Nicor Gas conducted a process that produced its proposed allocation of its proposed total sendout. This statement says nothing about the whether other parties disagreed with Nicor Gas’ proposed figures, which, as discussed above, the People did.**

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None of these points provides any reason for the Commission to accept Nicor Gas’ proposed residential sales figure, nor do they provide any analysis why Mr. Effron’s residential sales figure is incorrect. Therefore, Nicor Gas’ arguments and associated replacement language should be rejected.

(The People Of The State Of Illinois’ Reply To Northern Illinois Gas Company’s Brief On Exceptions (“AG RBOE”), pp. 13-17 (emphasis added))

19. As noted above, the Final Order did not contain any of Nicor’s proposed exceptions language regarding the offset issue. Given that Nicor’s assertions and requested relief were highly contested by the AG, Nicor’s claim that the Final Order should be interpreted through implication to infer an acceptance of its position borders on the ridiculous. If anything, the only inference that can be made from the Commission’s Final Order with this background is that Nicor’s position was rejected. Further, because this issue was specifically raised and contested, any claim that the Commission considered this issue to be a “clarification” issue which did not require “clarification” would be nonsensical. As Staff has repeatedly noted in this response, the issue is not what the Commission’s Final Order should have held or ordered, but what it did hold or order. While Nicor portrays the offset issue as a routine rate design matter that should obviously be inferred, the fact of the matter is that this was a contested

issue and the Commission – presumably because it found the AG’s argument to be more compelling – did not accept Nicor’s position in its Final Order. Staff is unaware of any good reason why it should or could infer that the AG’s well articulated positions in opposition to Nicor’s arguments were rejected by the Commission when the Commission did not include language in its Final Order accepting Nicor’s positions or arguments.

20. When the instant motion is considered in view of the above-described facts, Nicor’s compliance filing could potentially be viewed as an attempt to gain an unfair advantage over other parties – here the AG -- by including in that tariff a contested position that was not accepted by the Commission. While Staff believes and hopes this was not the case, it is extremely disappointing that Nicor neglected to mention these obviously relevant facts to the Commission in its motion. In any event, for all the reasons stated above, Staff submits that its determination that Nicor’s tariffs filed on September 30 did not comply with the Final Order was fully and clearly correct.

21. Nicor claims that it would recover \$5.4 million less in revenues than the revenue requirement approved in the Final Order as a result of the rejection of its September 30 tariffs. (Compliance Tariff Motion, pp. 3-4) This argument is nothing but a red herring apparently designed to distract the Commission from the relevant facts and analysis discussed above. That fact of the matter is that under Staff’s interpretation of the Final Order (1) Nicor’s October 4 tariffs contain rates designed to fully recover the revenue requirement ordered by the Commission and (2) Nicor’s September 30 tariffs contain rates designed to over recover the revenue requirement ordered by the Commission. Conversely, under Nicor’s interpretation of the Final Order (1) its

September 30 tariffs contain rates designed to fully recover its revenue requirement and its October 4 tariffs contain rates designed to under recover its revenue requirements. The true nature of the dispute here is how the Commission's Final Order should be interpreted in terms of the billing determinants used to design rates. If tariffs are filed consistent with a correct interpretation of the Final Order, there will be no over recovery or under recovery.

22. The Commission ordered an increase in Rate 1 billing determinants without ordering an offsetting decrease in any other billing determinants. Accordingly, under the Commission's Final Order the only appropriate change in the compliance tariffs is to increase Rate 1 billing determinants (as is achieved in the October 4 tariffs). The Commission should deny Nicor's Emergency Motion to place into effect the erroneous rates filed by the Company on September 30<sup>th</sup>, 2005; which were properly rejected by the Chief Clerk's Office as a result of Staff's recommendation, so that rates filed on October 4, 2005, that are based upon proper test year Rate 4 therm deliveries, remain in effect.

23. The ALJs' Notice directs Staff to "fully explain its legal theories as to why Rate 4 is non-compliant or erroneous in the September 30 tariff filing . . . ." While Staff did not consider its determination that the September 30 tariff filing was non-compliant to be fully or even primarily based on "legal theories", Staff trusts that the foregoing analysis and explanation fully complies with the ALJs' directive.

24. The only action by the Commission that would be appropriate as a result of Nicor's Emergency Motion is a technical correction of the Appendix to the Order in Docket No. 04-0779 to restate revenues at current rates to \$509,506,000, adjusted from

the Company's calculation of present revenues to what present revenues at current rates would be when including the adjustment to terms delivered under Rate 1 as accepted in the Order. The restatement of present revenues at current rates would be accompanied by a restatement of the amount and percentage of the increase in Finding (10) of the Order.<sup>7</sup> What would remain intact is the Order's finding that revised rates should result in revenues totaling \$558,347,000 in revenues from revised base rates. Staff recommends that the Commission reject Nicor's Emergency Motion so that the tariffs filed on October 4<sup>th</sup>, 2005 remain in effect because the tariffs properly allow the Company the opportunity to recover revenues approved in the Order based upon the record in Docket No. 04-0779.

### **III. Legal Effect of Rejecting the Compliance Tariffs Filed September 30-2005**

25. The ALJs' Notice also directs Staff to "fully explain . . . what legal effect that its letter (issued by the Chief Clerk on October 3, 2005) has in the absence of an appropriate motion in this docketed proceeding." (ALJs' Notice Dated October 5, 2005). Staff must admit to some concern with this direction. Although Nicor's motion contends in a footnote that the PUA does not give Staff the authority to reject filed tariffs, it does not seek a ruling on that basis. (Tariff Compliance Motion, p. 2, fn. 2) Rather, Nicor seeks an expeditious ruling on the merits of the proper interpretation of the Commission's Final Order. (Id.) Accordingly, Staff submits that the Commission should rule on the merits, and not address here any extraneous concerns it might have in the context of this emergency motion and extremely expedited response schedule.

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<sup>7</sup> The restated increase in revenues from base rates that reflects the Order's acceptance of the Rate 1 adjustment would be \$48,841,000 or 9.59%.

26. With respect to “the legal effect of ‘its letter’ issued by the Chief Clerk” Staff would first point out to the ALJs that the letter is not a Staff letter. It is a letter from the Chief Clerk that was issued by the Chief Clerk on behalf of the Commission. The order in this docket provides the Chief Clerk with the authority to issue such a letter. The Chief Clerk’s rejection letter has the effect of other such letters issued by the Chief Clerk’s office - the underlying tariffs are not accepted for filing and do not become effective. Staff notes that the Commission has recognized the Chief Clerk’s ability to reject tariffs that are facially defective. (Order, Illinois Commerce Commission, On its Own Motion, Revision of 83 Ill. Adm. Code 792, Docket No. 99-0536, 2002 Ill. PUC LEXIS 565, 86-96, 118-119 (June 19, 2002) (Commission declined to adopt provision of rule allowing Staff to reject certain traditional 45 day telecommunication tariff filings that contain an incomplete imputation test submission because Staff’s determination of completeness based on compliance with other requirements in proposed rule went beyond the ministerial act contemplated by Staff in its proposal.)

27. The Chief Clerk in conjunction with Staff in its compliance review role are both acting on behalf of the Commission as directed by the Commission in its Final Order, specifically Finding 12. Finding 12 of the Commission’s September 20, 2005 Order directed Nicor to file new tariff sheets as authorized by the order which if necessary were to be corrected within three days (reduced to two days in the amendatory order). Finding 12 assumes that a review of the new tariff sheets is to take place and the possibility that corrections may be necessary. Such a procedure as contemplated by Finding 12 is exactly what took place here. Nicor filed new compliance tariffs on September 30, 2005, those tariffs were reviewed to determine whether they

were consistent with the order, those tariffs were not compliant with the Commission's Final Order, and subsequently corrected tariffs were filed on October 4, 2005 (following the rejection of the non-compliant tariffs). Without such a review by the Staff acting on behalf of the Commission, a public utility could unilaterally implement compliance tariffs – ordered to be effective on very short notice – that are contrary to the special permission ordering language and that significantly over recover the allowed revenue requirement.

28. Section 9-201(a) of the Public Utilities Act provides that “[u]nless the **Commission otherwise orders**, and except as otherwise provided in this Section, no change shall be made by any public utility in **any** rate or other charge or classification, or in **any** rule, regulation, practice or contract relating to or affecting **any** rate or other charge, classification or service, or in any privilege or facility, **except after 45 days' notice** to the Commission and to the public as herein provided.” (220 ILCS 5/9-201(a) (emphasis added)) Section 9-201(a) further provides that “[t]he Commission, for good cause shown, **may allow changes without requiring the 45 days' notice** herein provided for, **by an order specifying the changes so to be made and the time when they shall take effect** and the manner in which they shall be filed and published.” (Id. (emphasis added)) Section 9-201(a) applies broadly to **any** tariff, and Commission rate orders typically include ordering paragraphs consistent with Section 9-201 allowing rates consistent with the order to take effect within less than 45 days. Therefore, the Commission's authority to order that tariffs containing specific changes take effect on less than 45 days notice is directly granted in Section 9-201, and the effect of the Clerk's letter rejecting that filing as non-compliant with the Commission's order is to

render such filing ineffective. It appears to Staff that Nicor's options at that point were to (1) file tariffs compliant with the Commission's order (and to be effective on shortened notice) or (2) to file its non-compliant tariffs with an effective date of not less than 45 days.

29. Staff does not agree with the implication in the ALJs' Notice that Staff should have filed a motion. In this case, like other rate cases in the past, the Commission ordered (1) that compliance tariffs be filed based upon its final order; (2) that those tariffs, if not in compliance with the order, were to be corrected; and (3) that compliant tariffs could be effective within two days of its filing. Once the tariffs are corrected the Commission's order allows them to go into effect. The process contemplated by the Commission's Final Order does not assume nor does it require that Staff, as the reviewer of the compliance tariff, file a motion to bring the matter to the Commission's attention. Such a requirement would be illogical and inappropriate. Given the 2 day notice period adopted in this case, such a practice would essentially appoint the utility – a participant with an obvious bias – as the decision maker with respect to the rates to take effect on the shortened notice. While Staff would certainly consider seeking clarification from the Commission on unclear matters if time permitted, such a procedure was not possible in this case given the 2 day turnaround ordered by the Commission.

**WHEREFORE**, the Staff of the Illinois Commerce Commission respectfully requests that the Illinois Commerce Commission deny Nicor's Compliance Tariff Motion, for the reasons stated above.

Respectfully submitted,

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