

**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission	)	
On Its Own Motion	)	
v.	)	
The Peoples Gas Light and Coke Company	)	05-0341
	)	
Citation for alleged violation of Commission	)	
rules regarding leakage surveys.	)	

**REPLY BRIEF OF**  
**THE PEOPLES GAS LIGHT AND COKE COMPANY**

Pursuant to Section 200.800 of the Illinois Commerce Commission’s (“Commission”) Rules of Practice, ILL. ADMIN. CODE TIT. 83, § 200.800 (2005), and the schedule established by the Administrative Law Judge, The Peoples Gas Light and Coke Company (“Peoples Gas”) submits its Reply Brief in the above-captioned proceeding.

**INTRODUCTION**

It bears repeating that this is a unique proceeding. Staff witness, Mr. Evans, has conceded there has been none like it in the country. Because the Commission never has imposed a civil penalty under 49 C.F.R. § 192.723(b)(2) (2005) (“Section 192.723(b)(2)”), it has not opined when a civil penalty should be imposed or how the amount should be calculated.

Here, the Citation was issued because Staff’s May 20, 2005 Report predicted that (a) Peoples Gas would be further out of compliance at the beginning of 2006 than at the beginning of 2004 and (b) its goal of completing delinquent surveys by January, 2006 “appears to be unattainable and no goal they set at this point appears to be realistic or

attainable.”<sup>1</sup> But in calendar year 2005, Peoples Gas completed nearly 117,000 due and past ISIs, which was nearly 90% of the total ISIs due and past due.<sup>2</sup> Further, as Peoples Gas worked to catch up on the backlog of ISIs, any potential safety risk from the inside pipes was minimal. As a result, Peoples Gas respectfully submits that there should be no reason to impose a \$1 million, or any substantial, civil penalty.

## ARGUMENT

### **A Substantial Civil Penalty is Unwarranted Because Peoples Gas’ Completion of All But Approximately 10,000 ISIs Demonstrates Good Faith and Its Best Efforts In Eliminating the ISI Backlog**

#### **A. Peoples Gas’ Efforts to Comply with Section 192.723(b)(2) Were Made in Good Faith**

As described in Peoples Gas’ Initial Brief in detail,<sup>3</sup> its efforts to obtain compliance were ever increasing. By the end of 2005, only approximately 10,000 ISIs had not been completed.

In its Initial Brief, Staff cites a portion of the definition of good faith in an earlier edition of *Black’s Law Dictionary*. Staff also cites the Commercial Code’s definition, which requires observance of “reasonable commercial standards.” The Commercial Code’s definition essentially imposes an objective test that is somewhat unique, *albeit* understandable, in the commercial context.<sup>4</sup>

While “good faith” may take on different meanings in different contexts, *See Black’s Law Dictionary* 715 (8th Ed. 2004), a determination of good faith requires an inquiry as to motive, rather than results. *See Cohn v. Cohn*, 122 Ill. App. 3d 763, 766, 461 N.E.2d 1028, 1031 (2d Dist. 1984) (former husband’s denial of petition for reduction

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<sup>1</sup> Order at 2.

<sup>2</sup> *See* Respondent Exhibit No. 1.

<sup>3</sup> *See* Peoples Gas’ Initial Brief at 10-11.

<sup>4</sup> *See* Staff’s Initial Brief at 7-8.

of child support reversed where evidence showed he participated in strike in “good faith” to improve his standard of living, not to evade financial responsibility for his children’s support). This is consistent with the “good faith” requirement in the Illinois Pipeline Safety Act, 220 ILCS 20/7(b) (the “Act”), which does not focus upon results. Instead, the Act focuses upon the charged party’s good faith “in attempting to achieve compliance.”

Given the Act’s focus, a finding of a lack of good faith should not be based upon Peoples Gas’ inability to obtain a particular result at a particular time. Peoples Gas’ compliance efforts may not have been as speedy as Peoples Gas expected. But, fairly analyzed, the record shows that Peoples Gas consistently worked to complete ISIs, which required overcoming the significant obstacles inherent in obtaining access to its customers’ homes.<sup>5</sup>

There is no dispute that the results of Peoples Gas’ recent efforts to conduct ISIs were significantly more successful than its earlier efforts. But a mere recitation of these historical results does not establish a lack of good faith.<sup>6</sup> Nor does taking an average of the ISIs conducted from 2000 – 2004.<sup>7</sup> Indeed, the recitation of these numbers is meaningless in the face of Peoples Gas’ testimony and evidence that it continually worked and reworked its efforts, and devoted considerable resources, to completing ISIs.

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<sup>5</sup> See Peoples Gas’ Initial Brief at 10-11. The Commonwealth of Pennsylvania’s regulations governing leakage surveys expressly recognize the inherent difficulties in obtaining access to customers’ residences. Under those regulations, if a customer refuses access to the premises, the utility may shut off gas service until access is provided. Further, if the utility cannot obtain access because the occupants are absent, the utility must leave a notice instructing the customer to designate a day and time for the inspection during normal working hours and the leakage survey may be deferred until the day and time designated. See 52 Pa. Code § 59.34(b) (2005).

<sup>6</sup> See Staff’s Initial Brief at 9-10.

<sup>7</sup> See Staff’s Initial Brief at 11.

Merely because for some time Peoples Gas' results were less than desired, does not mean "that it did less work."<sup>8</sup>

In sum, Peoples Gas' increasingly more aggressive efforts to complete the ISIs demonstrates its good faith and best efforts. As a result, this factor should not support imposing a substantial civil penalty.

**B. The Significance of Section 192.723(b)(2)'s Express Language and DOT's Interpretation**

Peoples Gas' purported violation of Section 192.723(b)(2) is based upon the assumption that the requisite leakage surveys under this section include inspection of inside pipes. While it is Peoples Gas' policy to perform ISIs, this requirement is not found in Section 192.723(b)(2)'s express language. Rather, a United States Department of Transportation ("DOT") statement supplies this interpretation. Section 192.723(b)(2)'s express language therefore should be considered in assessing whether a civil penalty should be imposed.

Significantly, the term "leakage survey" is not defined in Section 192.723(a)(2) or elsewhere in 49 C.F.R. Part 192.<sup>9</sup> Nor has the Commission (through regulation or decision) or any Illinois court had occasion to define the term. As discussed below, DOT, without citation of authority or substantive analysis, has indicated that a leakage survey under Section 192.723(b)(2) requires inspection of inside pipes.

Initially, the Illinois Pipeline Safety Act requires the Commission to "adopt rules establishing the minimum safety standards for the transportation of gas and pipeline facilities," which "rules shall be at least as inclusive, as stringent, and compatible with, the minimum standards required by the Secretary of Transportation under the Federal

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<sup>8</sup> See Staff's Initial Brief at 11.

<sup>9</sup> See 49 C.F.R. § 192.3 (2005) (Definitions).

Act.” 220 ILCS 20/3. Through 83 Ill. Adm. Code 590.10, the Commission adopted the standards contained in 49 CFR Part 192 as its minimum safety standards.

In adopting the federal standards, neither the Illinois legislature nor the Commission defined the term “leakage survey” or addressed what Section 192.723(b)(2)’s leakage survey requires. Illinois’ adoption of the federal standards therefore added no clarity to the obligations of a distribution system’s operator under Section 192.723(b)(2).

DOT addressed what a leakage survey under Section 192.723(b)(2) encompasses in the context of issuing a new rule (which is part of the current version of Section 192.723(b)(2)) that requires operators of distribution lines in residential districts to use leak detectors to carry out required leakage surveys. *See* 58 Fed. Reg. 54524 (Oct. 22, 1993). Prior to this rule change, some operators had used vegetation surveys, a less reliable method. In discussing the comments of certain distribution operators that the new rule be limited to buried pipe, DOT stated, without substantive analysis or citation of authority, that “existing § 192.723(b)(2) requires leakage surveys on interior piping that is subject to [49 C.F.R.] Part 192.” *Id.* at \*4.

Because a DOT interpretation rather than the express language of Section 192.723(b)(2) that requires that inside pipes must be inspected, these circumstances militate against the imposition of a civil penalty. It is well established that a penal statute must be strictly construed and will not be extended “beyond [its] obvious or literal meaning,” *People ex rel. Ill. State Bd. of Election*, 105 Ill. App. 3d 509, 546, 434 N.E.2d 543, 546 (1st Dist. 1982), or “to embrace matters beyond its terms.” *Jackim v. CC-Lake, Inc.*, 2005 WL 3110574, at \*4 (1st Dist. 2005); *Molex v. Ill. Pollution Control Bd.*, 9 Ill.

App. 3d 1032, 1033, 293 N.E.2d 731, 732 (1st Dist. 1973). Provisions are penal when they specify either the amount of the damages that can be awarded for violations or the formula by which the amount of the damages is to be calculated.<sup>10</sup> These rules apply to statutes imposing civil penalties.<sup>11</sup>

Any violations of the Illinois Gas Pipeline Safety Act or any rule or order issued under that act are subject to a civil penalty not to exceed the maximum penalties under 49 U.S.C. § 60122(a)(1). 220 ILL. COMP. STAT. § 20/7 (West 2005). Under that federal penalty provision, the maximum penalty is \$100,000 for each violation, with a maximum penalty for a related series of violations of \$1 million. As a result, Section 7(b) of the Illinois Gas Pipeline Safety Act is a penal statute. As such, it should be strictly construed and not extended beyond its obvious meaning.

Given Section 192.723(b)(2)'s lack of express language regarding the necessity of ISIs, a civil penalty would have to be imposed (through Section 7(b) of the Illinois Gas Pipeline Safety Act), based upon a DOT interpretation. This seems at odds with the strict construction afforded penal statutes.

## CONCLUSION

For each of the reasons set forth above and in its Initial Brief, either independently or in combination, The Peoples Gas Light and Coke Company urges the Commission to find that a \$1 million civil penalty is not merited.

WHEREFORE, The Peoples Gas Light and Coke Company respectfully submits its Reply Brief in this proceeding.

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<sup>10</sup> *Sternic v. Hunter Properties, Inc.*, 344 Ill. App. 3d 915, 918, 801 N.E.2d 974, 976 (1st Dist. 2003); *Namur v. Habitat Co.*, 294 Ill. App. 3d 1007, 691 N.E.2d 782 (1st Dist. 1998).

<sup>11</sup> See e.g., *Jackim*, 2005 WL 3110574, at 4 (discussing Security Deposit Interest Act, 756 ILCS 715/2).

Respectfully submitted,

The Peoples Gas Light and Coke Company

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Dated at Chicago this  
11th day of January, 2006

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**NOTICE OF FILING AND CERTIFICATE OF SERVICE**

TO: Service List

PLEASE TAKE NOTICE that on this 11th day of January, 2006, I have filed with the Chief Clerk of the Illinois Commerce Commission the Reply Brief of The Peoples Gas Light and Coke Company, a copy of which is hereby served upon you by e-mail and/or United States Mail on January 11, 2006.

The Peoples Gas Light and Coke Company

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