

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.)	

**THE PEOPLES GAS LIGHT AND COKE COMPANY’S BRIEF ON
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE’S PROPOSED ORDER**

Pursuant to Section 200.830 of the Illinois Commerce Commission’s (“Commission” or the “ICC”) Rules of Practice (83 Ill. Admin. Code §200.830(e)), The Peoples Gas Light and Coke Company (“Peoples Gas”) submits its Brief on Exceptions, accompanied by its Exceptions (attached hereto as Exhibit 1), to the Administrative Law Judge’s Proposed Order issued on January 26, 2006 (the “Proposed Order”) in the above-captioned proceedings.

INTRODUCTION

The Proposed Order’s conclusion that Peoples Gas should be penalized \$500,000 essentially is based on an acceptance of Staff’s argument that the Commission should imply that Peoples Gas was not acting in good faith until after this citation proceeding was initiated. This conclusion, however, is inconsistent with the Proposed Order’s acknowledgement of Peoples Gas’ substantial efforts to overcome the obstacle of gaining access to its customers’ residences, as well as Peoples Gas’ continuing modification of those efforts and devotion of additional resources in response to poor results. Moreover, this conclusion is inconsistent with 220 ILCS 20/7(b)’s focus on a utility’s “attempt” to

achieve compliance and not on the results of that attempt. Under these circumstances, and in light of this being the first proceeding of its kind in the country and the questions raised as to the express requirements of 49 C.F.R. § 192.723(b)(2)'s language, the Proposed Order's recommended civil penalty should be reconsidered.¹

ARGUMENT

The Proposed Order's Recommended Civil Penalty is Inconsistent with the Evidence of Peoples Gas' Efforts to Achieve Compliance and, Under the Circumstances, Should Be Reconsidered

A. As Recognized by the Proposed Order, Peoples Gas Attempted in Good Faith to Comply with Section 192.723(b)(2)

The Proposed Order acknowledges that Peoples Gas had to rely upon its customers to grant it access to the meters and service pipes located in their residences in order for Peoples Gas to perform the inside safety inspections ("ISIs") purportedly required by 49 C.F.R. § 192.723(b)(2).² The Proposed Order also recognizes that after being notified of its alleged noncompliance, Peoples Gas responded by undertaking efforts to perform the required ISIs, and that when those efforts did not yield adequate results, Peoples Gas responded by continuously modifying those efforts and devoting more resources to correct the problem.³ In 2005, Peoples Gas finally succeeded in finding an approach that resulted in a number of completed ISIs that reasonably approached compliance in light of the Proposed Order's conclusion that it may be impractical or even impossible for Peoples Gas to ever attain 100% compliance with a strict reading of 49 C.F.R. § 192.723(b)(2).⁴

¹ This Brief on Exceptions incorporates by reference Peoples Gas' Initial Brief and Reply Brief as if fully set forth herein.

² Proposed Order at 17.

³ Proposed Order at 3-4, 17.

⁴ Proposed Order at 16-17.

Despite the acknowledged and uncontroverted evidence of Peoples Gas' continued attempts to achieve compliance prior to 2005, the Proposed Order accepts Staff's argument that the Commission should imply Peoples Gas was not acting in good faith based on *the results* those efforts yielded. Moreover, the Proposed Order further accepts the perverse implication argued for by Staff that Peoples Gas should be found to have acted in bad faith because it *succeeded* in achieving compliance in 2005.

As acknowledged in the Proposed Order, the standard set forth in 220 ILCS 20/7(b) requires the Commission to consider the "attempt" by Peoples Gas to achieve compliance with 49 C.F.R. § 192.723(b)(2) in determining whether it acted in good faith.⁵ The Staff's focus (adopted by the Proposed Order) on the failure of Peoples Gas' efforts to achieve the desired *results* is contrary to the letter and the spirit of Section 20/7(b). If the evidence were that Peoples Gas' initial efforts after being informed of noncompliance by Staff did not produce positive results but Peoples Gas did nothing to change its nonperforming approach for five years, then an implication of bad faith may be warranted. But that is not the case here; far from it.

Rather, the record demonstrates that Peoples Gas *did respond* to the poor results its initial efforts produced; Peoples Gas modified its methods and devoted more resources to its efforts. Moreover, Peoples Gas continued to respond to unsatisfactory results by modifying its approach and devoting more resources to its efforts again and again. This record of continuing modification by Peoples Gas in response to the results criticized by Staff dispels any notion that Peoples Gas was not acting in good faith.

⁵ Proposed Order at 17.

In sum, Peoples Gas' increasingly more aggressive efforts to complete the ISIs demonstrates its good faith and best efforts. As a result, contrary to the conclusion of the Proposed Order, no substantial civil penalty is warranted.

B. The Proposed Order's Recommended Penalty Would Penalize Peoples Gas for Achieving Success in 2005

The main thrust of Staff's argument, adopted by the Proposed Order, is that Peoples Gas must not have been acting in good faith to achieve compliance during 2000 through 2004 because the company's efforts during those years yielded poor results in comparison to the successful results Peoples Gas achieved in 2005 after the initiation of this proceeding. This argument ignores the procedural history and record in this matter.

First, Peoples Gas' approach to performing ISIs that produced reasonable compliance in 2005 was presented to Staff on November 5, 2004 and implemented by Peoples Gas in April, 2005.⁶ This Citation was issued on June 2, 2005 based upon the Staff's May 20, 2005 report to the Commission in which Staff concluded that Peoples Gas' new approach would not achieve compliance by January 2006.⁷ Thus, the claim that Peoples Gas' successful results in 2005 were solely the result of Peoples Gas finally devoting sufficient efforts to the ISI issue in response to the Citation order is wrong and contrary to the record. Rather, the record demonstrates that the approach of Peoples Gas that yielded successful results in 2005 had been planned and implemented by Peoples Gas long before this proceeding began. Correctly examined in the context of this procedural history, what the facts concerning Peoples Gas' success in achieving reasonable compliance by the end of 2005 prove is that Staff's analysis of Peoples Gas'

⁶ See Proposed Order at 5.

⁷ *Id.*

new approach was incorrect and that Staff prematurely sought the issuance of the Citation.

Second, Staff's argument based upon Peoples Gas' 2005 results ignores the advances Peoples Gas began to achieve the previous year. In 2004, Peoples Gas completed 52,297 due and past due ISIs, a significant improvement over the 25,165 due and past due ISIs completed in 2003. Peoples Gas' planned approach for 2005 was a further improvement on an approach that had proven in 2004 to be on the right track. The success Peoples Gas achieved in 2005 thus was not a response to this proceeding, but rather, the natural progression of its efforts to modify and improve its methods for performing due and past due ISIs.

Accordingly, Peoples Gas' 2005 ISI performance demonstrates the result of the company's ongoing good faith attempts to achieve compliance with 49 C.F.R. § 192.723(b)(2).

C. The Proposed Order's Recommended Civil Penalty Should Be Reconsidered in Light of Questions Concerning Section 192.723(b)(2)'s Requirements and that this Proceeding Presents a Matter of First Impression

The Proposed Order recognizes that serious questions exist concerning what is required of a utility by Section 192.723(b)(2).⁸ As more fully explained in Peoples Gas Reply Brief,⁹ the term "leakage survey" is not defined in Section 192.723(a)(2) or elsewhere in 49 C.F.R. Part 192. Nor has the Commission (through regulation or decision) or any Illinois court had occasion to define the term. Nowhere in the language of any of the relevant statutes and regulations is there any discussion of a utility having to go inside of its customers' residences to perform inspections; indeed, nowhere in these

⁸ Proposed Order at 17.

⁹ Peoples Gas' Reply Brief at pp. 4-6, which is incorporated herein by reference.

relevant statutes and regulations is the word “inside” even used. Because Section 7(b) of the Illinois Gas Pipeline Safety Act is a penal statute due to the nature of the substantial civil penalties provided for by this provision, it 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).

Furthermore, the Commission never has imposed a civil penalty under 49 C.F.R. § 192.723(a)(2), and thus has not opined when a civil penalty should be imposed or how the amount should be calculated. Indeed, Staff witness, Rex Evans, conceded that it is the first proceeding of its kind anywhere in the country.

The questions concerning whether a civil penalty should be imposed in light of the Section 192.723(a)(2)’s lack of clarity as to what its language requires utilities to do and this proceeding presenting a matter of first impression, combined with the strong showing of Peoples Gas’ good faith, further support the conclusion that the Proposed Order’s recommendation that a civil penalty is warranted, and the size of that penalty, should be reconsidered.

CONCLUSION

For the reasons set forth above, as well as in its Initial Brief and Reply Brief, either independently or in combination, The Peoples Gas Light and Coke Company urges the Commission to modify the Proposed Order consistent with the attached Exceptions.

WHEREFORE, The Peoples Gas Light and Coke Company respectfully submits
this Brief on Exceptions.

Dated at Chicago, Illinois this 9th day of February, 2006.

Respectfully submitted,

The Peoples Gas Light and Coke Company

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