

**Report Pursuant to 83 Ill. Adm. Code 200.520
of the Commission's Rules of Practice**

Docket No: 01-0707
Bench Date:11/02/05
Deadline: N/A

TO: The Commission

FROM: Administrative Law Judge Claudia E. Sainsot

DATE: October 21, 2005

SUBJECT: Illinois Commerce Commission
On Its Own Motion,

Reconciliation of revenues collected under gas adjustment charges with actual costs prudently incurred.

Petition of the Peoples Gas Light and Coke Co., for interlocutory review of a ruling striking part of its Posttrial Briefs.

RECOMMENDATION: Deny the Relief Sought in the Petition.

Please note that if this Commission were to hold this matter, the ALJ will not be able to attend the November 8, 2005 Regular Open Meeting session.

This docket is a reconciliation of revenues collected by the Peoples Gas Light and Coke Co. ("PGL") under PGL's purchased gas adjustment clause (its "PGA") with the actual costs PGL prudently incurred in PGL's fiscal year 2000. (220 ILCS 5/9-220)). In such a proceeding, this Commission examines the propriety of PGA-related transactions. If a transaction is found by this Commission to be imprudent, a utility then deducts that imprudent cost from the PGA portion of its customers' bills.

PGL's interlocutory appeal concerns an ALJ ruling granting a motion to strike certain parts of PGL's posttrial briefs, and, requiring it to re-file those briefs without information deemed in that ruling to be extraneous to the record. PGL also asks this Commission to allow it to make an offer of proof, now, and consider evidence ruled to be irrelevant at trial. Staff, as well as the Government and Consumer Intervenors, (the "GCI") which are, collectively, the Illinois Attorney General, the City of Chicago and the Citizens Utility Board, filed responses to this Petition.

Background

At trial, the ALJ denied a motion made by counsel for PGL to take administrative notice of certain other Commission proceedings. PGL sought to admit this evidence in order to establish what other Illinois gas companies charged consumers in the way of gas costs during the reconciliation period. (Tr. 1329-35). This motion was denied based on lack of relevance; the ALJ deemed the charges imposed by other companies to be irrelevant to a determination as to what costs PGL prudently incurred during the time period in question. (*Id.* at 1333-35). PGL did not make an offer of proof or seek reconsideration of this determination.

The record was marked “Heard and Taken” at the end of trial. PGL never sought to reopen the record or otherwise present this evidence in an evidentiary setting, that is, one that would allow the other parties an opportunity to be heard on the evidence in question.

Nevertheless, in its Initial Posttrial Brief, PGL cited other Commission proceedings for the proposition that other Illinois utilities charge amounts similar to those PGL imposed on consumers during the time period in question. The GCI moved to strike these references, arguing that they were made to establish evidence that was specifically excluded by the ALJ’s ruling at trial determining that this evidence was irrelevant and inadmissible. (01-0707, *Motion to Strike of the GCI* filed July 18, 2005). The ALJ issued a ruling on August 9, 2005, granting the GCI’s Motion, in part. That ruling determined that PGL’s citation to various Commission dockets for the proposition other companies’ gas charges to consumers were comparable to those of PGL was really an attempt to include evidence excluded at trial. The ALJ ruled that such evidence would not be considered, but, there was no need to strike it from PGL’s Brief. (01-0707, ALJ Ruling, August 8, 2005).

In its Posttrial Reply Brief, however, PGL ignored this ruling and asserted that it “renewed its request” for admission of this evidence into the record. (PGL Posttrial Reply Brief at 4, 17-20). PGL asserted that this evidence should be admitted to prove that it acted in a fair manner. (*Id.*). PGL contended that, because Staff and the GCI accused PGL in their Initial Posttrial Briefs of entering into transactions in order to benefit PGL’s parent company, Peoples Energy Corporation, (“PEC”) as a matter of law, it must be permitted to present evidence that the self-dealing transactions were fair. PGL argued that it was being accused, for the first time, of improperly conferring benefits on PEC, at the expense of ratepaying consumers. (*Id.* at 19). It averred that it must be allowed to present evidence to establish the “fairness” of its dealings, and thus address Staff’s and the GCI’s arguments in their Initial Posttrial Briefs. (*Id.* at 19). PGL also sought permission to make an offer of proof, for the first time, in its Posttrial Reply Brief. (*Id.*).

In a ruling dated September 16, 2005, the ALJ determined that evidence establishing other companies’ charges to consumers has no probative value on the issue here—whether PGL entered into transactions in a prudent manner. The ALJ also

ruled that evidence of fairness, in the context PGL cited, has to do with establishing the fairness of the alleged self-dealing, not what other companies charge consumers. Pursuant to statute, when a corporate director receives a personal benefit from a transaction with or by the corporation, that director can be required to demonstrate that the arrangement was fair to the corporation's shareholders. (See, e.g., *Olsen v. Floit*, 219 F.3d 655, 657 (7th Cir. 2000), construing Illinois law.). Thus, fairness, in terms of self-dealing, can be determined by introducing the value of comparable transactions. (*Olsen*, 219 F.3d at 657).

The ALJ commented that PGL did not seek to admit evidence regarding other gas companies' gas purchase contracts, which is pertinent to the issue at bar, fairness in the transactions PGL entered into. Rather, PGL sought to admit the gas charges imposed on consumers by other gas companies. The ALJ concluded that the gas charges of other companies are not probative as to the prudence of PGL's purchase transactions. In so ruling, the ALJ noted that many factors determine what consumers actually pay a utility in a PGA gas charge, including the number of customers a utility has, as a cost spread out over a large number of customers has less impact on those customers than a cost spread out over a smaller service territory. Also, the ALJ concluded that PGL was incorrect in asserting that self-dealing was raised for the first time in Initial Posttrial Briefs. (See, 01-0707, ALJ Ruling September 16, 2005).

The ALJ denied PGL's request to make an offer of proof, ruling that PGL's failure to make an offer of proof at trial constituted waiver of its right to a determination that evidence should have been admitted at trial. The ALJ further ruled that the time to make an offer of proof was at trial, not in a posttrial brief. (*Id.*).

The Interlocutory Appeal

Staff and Others Asserting New Legal Theories

In its petition for interlocutory review, PGL asks this Commission to determine the propriety of the ALJ Ruling of September 16, 2005, denying PGL's request to admit documents attached to its Posttrial Reply Brief into evidence. Attached to PGL's Petition for Interlocutory Review are bar charts and graphs, as well as statistics about other gas companies. PGL makes no attempt to explain who prepared these documents, or, from where the information in those documents originated. Yet, it seek admission of these documents as evidence.

According to PGL, Staff argued, for the first time, in its Initial Posttrial Brief, that this proceeding should be "fundamentally expanded" beyond the scope of a Section 9-220 reconciliation to include business transactions with unspecified business entities. PGL asserts that Staff's Initial Posttrial Brief was its first announcement that it sought a "fundamental alteration" as to how PGL's gas costs should be examined. According to PGL, Staff asserted in its Initial Brief that PGL's decision to enter into the GPAA, a gas supply contract with Enron, was influenced by a desire to confer profit on PEC through PEC's profit-sharing venture with Enron, enovate. PGL posits that Staff never articu-

lated this theory before Staff filed its Initial Posttrial Brief. (PGL Petition for Interlocutory Review at 3).

PGL also contends that the ALJ Ruling of September 16, 2005, denying it posttrial admission of this evidence was wrong because the evidence in question would establish that, despite transactions between PGL affiliates and Enron/Enron subsidiaries, PGL's gas charges were similar to what other Illinois gas companies charged. (*Id.* at 4). PGL asserts that evidence as to what other gas companies charged their customers would establish that its charges were comparable to utilities whose parent companies did not have a profit-sharing agreement Enron. (*Id.* at 10).

PGL maintains that the September 16, 2005, ALJ ruling erroneously concluded that many factors determine what consumers pay because that ruling has no support in the record. Also, according to PGL, these factors do not concern the relevance of the filed gas charge data; they only determine the weight that such evidence should be given on the issue of prudence. PGL cites no law or facts in support of this conclusion. (PGL Petition for Interlocutory Review at 11).

The GCI argue that PGL is incorrect in stating that Staff asserted a new theory in its posttrial briefs. The GCI posit that PGL's remedy for assertion of a new legal theory in a posttrial brief would be to move to strike that new legal theory, not present evidence on a posttrial basis. (GCI Response at 4). The GCI argue that the information PGL seeks to admit was not available to PGL personnel at the time PGL entered into the GPAA. The GCI conclude that therefore, admission of this evidence is a *post hoc* attempt to justify the GPAA and this evidence is an improper hindsight review of PGL's actions. (*Id.* at 5).

Staff argues that the role of the PEC/Enron profit-sharing partnership was not a factor in Staff's evaluation of the GPAA. Rather, it was the reason why Staff altered the manner in which it reviewed other PGL transactions that had an impact on its gas costs. Staff points out that its reasons for regarding the GPAA as imprudent had to do with the costs which the GPAA imposed on ratepaying consumers. In Staff's view, these costs were significantly and consistently higher than what PGL should have otherwise expected to pay for gas. (Staff Response at 2, 6). Also, according to Staff, PGL quoted its Initial Posttrial Brief out of context, as the sentence PGL quotes is from a paragraph that did not concern the GPAA. Staff concludes that the reason PGL proffered for admitting the evidence into the record, on a posttrial basis, really has nothing to do with Staff's arguments about the GPAA. (*Id.* at 7-8).

Analysis and Conclusions

In February of 2004, discovery in this docket was reopened for the express purpose of determining whether some business dealings between PGL/PGL affiliates and enovate, LLC, PEC's profit-sharing venture with Enron, had an impact on the gas charges PGL imposed on consumers during the reconciliation period. In the prefiled direct testimony submitted in advance of trial by all of the parties, but, particularly by

Staff, experts set forth in great detail what transactions PGL and its affiliates entered into with Enron/Enron affiliates and enovate that, according to these expert witnesses, unnecessarily caused consumers' gas charges to increase, while also conferring profit on PEC, PGL's parent company. (See, e.g., Staff Ex. 5.00, 7.00, generally). PGL has been on notice for a long time that parties challenged the propriety of certain transactions, contending that those transactions profited PEC and unnecessarily increased consumer costs.

Moreover, PGL has taken the wording in Staff's Initial Posttrial Brief out of context. The quoted language argued essentially that PGL entered into certain transactions in order to benefit its parent company, through Enron/Enron affiliates, and through enovate. In essence, Staff maintained that it was not only necessary to determine whether consumers received any benefit from some transactions, but, it was also necessary to determine where the money went from some transactions, as, according to Staff, the desire to confer profit on PEC motivated PGL personnel to enter into certain transactions. (See, e.g., Staff Initial Posttrial Brief at 14-15).

This is not a new theory. Rather, this was the theory express by Staff witnesses, including, but not limited to, Mr. Anderson, Mr. Knepler, Dr. Rearden and Ms. Hathhorn in testimony filed in advance of trial. PGL simply ignores the record in this case when contending that Staff's Initial Brief was its "first announcement" that it sought some sort of "alteration" regarding how its gas costs and its parent company's transactions were analyzed. (PGL Petition for Interlocutory Review at 3). PGL should not be allowed, now, to present evidence attached to a posttrial brief when that evidence was deemed to be irrelevant at trial when PGL did not make an offer of proof at trial or seek reconsideration of the decision to exclude that evidence.

Staff also correctly points out that the theory it alleged in its posttrial briefs was that PGL personnel entered into gas transactions other than the GPAA to confer benefits on PEC. Staff's theory never has been that the GPAA was entered into to confer benefits on PEC. Rather, Staff has consistently maintained that the GPAA was imprudent because it imposed unnecessary costs on consumers.

It should also be pointed out that, despite the inference that one could draw from the language in PGL's argument, Staff did not seek to expand the statutory requirements regarding prudence. Staff's statement only voiced Staff's position that unusual circumstances exist here.

PGL is also incorrect in asserting that the amount of money it charged consumers is comparable to gas charges imposed by other gas companies, and, therefore, evidence as to what other companies charged could establish that its relationship with Enron did not affect consumers. To be relevant, evidence must establish a fact of consequence to the determination of the pending action; it must be both material and have probative value. (*Demos v. Ferris-Shell Oil Co.*, 317 Ill. App. 3d 41, 53, 740 N.E.2d 9 (1st Dist. 2000)). However, there can be many reasons why a gas charge is higher or lower than that of another gas company, including the size of that utility's service territory and the

amount of company-owned storage that company has. (See, e.g., 83 Ill. Adm. Code 525.40(a)(2) requiring that only the costs associated with leased storage can be passed on to consumers through a PGA.). While a determination as to prudence can have some impact on consumer gas charges, the charges a consumer pays a gas utility are not the same as the transactions at issue here—purchases and sales of gas. If PGL’s gas charges were comparable to those of other Illinois gas companies, this fact would not establish that gas purchases or sales were prudent.

PGL is additionally incorrect in arguing that the factors determining what a consumer pays a gas company for gas only concerns the weight of the evidence. Determining the weight of the evidence is a process, by which, a trier of fact decides how important or how believable evidence is. (*Auler Law Offices, v. Industrial Commission*, 99 Ill. 2d 395, 400, 459 N.E.2d 960 (1984); *Prater v. J.C. Penny Life Ins. Co.*, 155 Ill. App. 3d 696, 699-700; 508 N.E.2d 305 (1st Dist. 1987)). However, the factors that determine what consumers pay gas companies for gas, some defined by law, some defined by a utility’s unique circumstances, (*i.e.*, its business opportunities or how much leased storage it has) do not in and of themselves concern how much weight evidence is to be given. This argument also ignores the fact that what costs are included in a PGA is determined by law. (See, 83. Ill. Adm. Code 525.40). PGL’s argument is meritless.

The Need to Present Evidence that PGL’s Customers Did not Experience Higher Winter Gas Prices

PGL argues that, because the Administrative Law Judge’s Proposed Order (the “ALJPO”) concluded that PGL failed to mitigate higher winter gas prices in the reconciliation period, it must be allowed to present evidence establishing that its customers did not experience higher winter gas prices than customers of other Illinois gas utilities. (PGL Petition for Interlocutory Review at 5). Also, according to PGL, the GCI acknowledged the propriety of admitting what other gas companies charged during the reconciliation period by stating that this Commission may review and apply after-the-fact information when determining the amount of economic harm done by an imprudent transaction. (*Id.* at 5-6).

The GCI contend that PGL’s argument regarding measuring the economic harm caused by imprudence is really an attempt on the part of PGL to introduce a new theory that PGL never introduced in testimony or at trial. The GCI maintain that, in so doing, PGL is not affording other parties with an opportunity to respond to or test that theory. (GCI Response at 6).

Analysis and Conclusions

PGL’s argument regarding assertions made in a Brief filed by the GCI is taken out of context. Indeed, PGL acknowledges that the GCI’s argument, cited above, concerned how to measure the damage done by an imprudent decision, which, necessarily, includes after-the-fact information, as opposed to what the decision-makers knew at the time a decision was made. (See, Joint Brief on Exceptions filed by the GCI at 7; PGL

Petition for Interlocutory Review at 11). The argument in the GCI's Brief on Exceptions was merely that, while an assessment of whether a cost was prudently incurred can only include what a decision-maker knew or should have known at the time of the transaction, once imprudence is established, the economic harm done by the imprudent transaction may be analyzed by reviewing after-the-fact information.

This statement is nothing more than an articulation of well-established law. (See, e.g., *Busse v. Paul Revere Life Ins. Co.*, 341 Ill. App. 3d 589, 599, 793 N.E.2d 799 (1st Dist. 2003)). In fact, there can be situations, in which, a transaction is deemed to be imprudent, but, because no financial harm occurred, the measure of harm done by that imprudence was determined to be \$0. This argument does not support PGL's contention that it should be allowed to present evidence after trial regarding other gas companies' gas charges.

Equally meritless is PGL's argument that evidence as to other gas companies' charges would establish that its customers did not experience higher winter gas prices, as was found to be the case in the ALJPO. This contention misrepresents the language in the ALJPO. The ALJPO found that PGL did not adequately address, during the winter of the reconciliation period, the fact that winter gas prices were higher than they were in summer. (See, e.g., ALJPO at 124-25). That gas prices, generally, were higher in the winter of the reconciliation period than they were at other times was never disputed by PGL. Indeed, there would be little point in storing summer gas for winter use, which PGL did, if gas were the same price in the winter as in the summer. And, what other gas companies charged consumers does not establish that what PGL did to mitigate higher winter gas costs during the winter of the time period in question was prudent. Finally, PGL cites no authority that would allow it to present evidence to refute conclusions drawn by a trier of fact in a posttrial order based on evidence at trial. Indeed, the law requires PGL to present evidence at trial to the trier of fact, not afterward. (*Cook County Board of Review v. Property Tax Appeal Board*, 339 Ill. App. 3d 529, 536-543, 791 N.E.2d 8 (1st Dist. 2003)).

Fairness in the Context of Self-Dealing

PGL argues that Staff has accused of self-dealing to confer profit on PEC. According to PGL, as a matter of law, when a transaction is challenged as being the result of self-dealing, the party alleged to have engaged in self-dealing may defend the propriety of the self-dealing transaction by establishing that it is fair. (PGL Petition for Interlocutory Review at 9-10). PGL maintains that therefore, it must be allowed to present the evidence at issue, now. PGL also argues that, in the context of public utilities, customers are analogous to a company's shareholders. (*Id.* at 10).

Staff avers that it never raised the fairness standard PGL seeks to apply here, which is corporate law. Rather, Staff asserted that PGL cross-subsidized an affiliate, in violation of Section 7-101 and 7-102 of the Public Utilities Act. (Staff Response at 12-13).

Analysis and Conclusions

PGL correctly cites corporate law; however, the law it cites has no application here. The statute PGL cites, 805 ILCS 5/8.60(a), is part of the Illinois Business Corporation Act of 1983. It concerns how to establish that a corporate director has not defrauded other shareholders of a corporation when that director enters into transactions with that corporation. (805 ILLCS 5/8.60(a)). It provides:

Director conflict of interest. (a) If a transaction is fair to a corporation at the time it is authorized, approved, or ratified, the fact that a director of the corporation is directly or indirectly a party to the transaction is not grounds for invalidating the transaction or the director's vote regarding the transaction; provided, however, that in a proceeding contesting the validity of such a transaction, the person asserting the validity has the burden of proving fairness. . .

(*Id.*). In that context, the cases cited by PGL have determined that a transaction between a director and a corporation can be determined to be fair, if the value of that transaction is comparable to what other similar transactions are. (*See, Olsen v. Floit*, 219 F. 3d at 656-67, applying 805 ILCS 5/8.60(a) and deciding whether the trial court correctly determined the value of a closely-held corporation; *Romanik v. Lurie Home Supply Center*, 105 Ill. App. 3d 1118, 1121-23, 277-29, 435 N.E.2d 712 (5th Dist. 1982), applying the common law before enactment of the Business Corporation Act to determine whether corporate officer's transactions with a corporation were in breach of that officer's fiduciary duty to the corporation; *Shelensky v. South Parkway Building Corp.*, 19 Ill. 2d 268, 272, 166 N.E.2d 793 (1960), determining whether the trial court correctly construed Illinois common law when determining whether shareholders were defrauded in transactions between corporations with interlocking directors.). None of the cases cited by PGL concern any corporate duty owed to a customer, which is the issue here. Cases establishing the value of a self-dealing transaction do not aid PGL when those cases concern the duty owed by an officer to a corporation, which is not the situation here.

Here, Staff and the other parties have contended, in effect, that the terms of some of PGL's gas purchase and sales transactions that passed costs on to consumers harmed those consumers. The proof that PGL seeks to introduce has no bearing on the terms of gas purchases and sales.

PGL cites no legal authority or factual basis for its argument that, in the context of public utilities, customers are analogous to a company's shareholders. Moreover, factually, here, this assertion is incorrect. The reason Illinois corporate law requires proof of comparable transactions to those of the self-dealing director-corporate transaction is that comparable transactions establish that shareholders were or were not harmed by the self-dealing transaction. (*Olsen*, 219 F. 3d at 656-67). However, evidence concerning shareholder harm simply does not address the issue here. For this reason, the ALJ ruling issued on September 16, 2005, concluded that, to establish fairness here,

PGL would have sought to offer proof of other gas companies' supply contracts, not proof of other companies' gas charges. (See, 01-0707, ALJ ruling of September 16, 2005, at 2).

Whether PGL Should Be Allowed to Make an Offer of Proof

PGL contends that it should be allowed, now, to make an offer of proof because, according to PGL, Commission rules do not require it to make an offer of proof at trial. PGL acknowledges that the regulation concerning offers of proof is in the section of Commission rules entitled "Hearing Procedures," (See, 83 Ill. Adm. Code 200.690) but avers that the rule in question is not just applicable to hearings. (PGL Petition for Interlocutory Review at 13-14).

Staff argues that even assuming that PGL could make an offer of proof on a post-trial basis, PGL mistakenly states that its request to make an offer of proof has not yet been denied. In fact, the ALJ denied PGL's request to do so, on a posttrial basis, in a ruling issued on September 16, 2005. (Staff Response at 13-14).

Analysis and Conclusions

PGL's argument is indeed a novel one. An offer of proof is made when a trier of fact rules, at trial, that testimony is inadmissible. (See, e.g., *Sinclair v. Berlin*, 325 Ill. App. 3d 458, 471, 758 N.E.2d 442 (1st Dist. 2001)). It is well-settled that an offer of proof allows the trier of fact the opportunity to correct itself regarding exclusion of evidence at trial. (See, e.g., *Sinclair*, 325 Ill App. 3d at 471).

An offer of proof informs the trier of fact, with particularity, as to what is being excluded as evidence. (*Snelson v. Kamm*, 204 Ill. App. 3d 1, 23-24, 787 N.E.2d 796 (2003)). It informs the trier of fact, opposing counsel and reviewing bodies of the nature and substance of the evidence sought to be introduced. (*Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 494-95, 771 N.E.2d 357 (2002)). PGL cites no law that allows an offer of proof after trial has concluded and thus after the time, in which, other parties could also present evidence on the issue.

In fact, failure to make an offer of proof at trial constitutes waiver of a party's right to challenge the exclusion of the evidence in question. (*Kim v. Mercedes-Benz*, 353 Ill. App. 3d 444, 452, 818 N.E.2d 713 (1st Dist. 2004)). Even failure to make an adequate offer of proof at trial results in waiver. (*Demos v. Ferris-Shell Oil Co.*, 317 Ill. App. 3d 41, 53-54, 740 N.E.2d 9 (1st Dist. 2000)). PGL's failure to make any offer of proof, at trial, constitutes a waiver of its right to have this Commission consider its arguments that this evidence should be considered. (*Id.*).

Finally, PGL misapplies the law in asserting that this Commission should ignore the fact that the rule governing offers of proof is in the section of the Commission's rules of practice entitled "Hearing Procedures." (PGL Petition for Interlocutory Review at 13). The rules of statutory construction, which are also applied to construction of regulations,

provide that the title or heading is considered as a short-hand reference to the general subject-matter involved in that statutory section; that title cannot limit the plain meaning of the text. (*Land v. Chicago Board of Ed.*, 202 Ill. App. 3d 414, 429-30, 781 N.E.2d 249 (2002); (*Combs v. Board of Ed. of Avon Center School Dist. No. 47*, 147 Ill. App. 3d 1092, 1100, 498 N.E.2d 806 (2nd Dist. 1986)).

When construing a statute, an adjudicator must ascertain and give effect to the intent of that law. (*DeWitt v. McHenry County*, 294 Ill. App. 3d 712, 716, 691 N.E.2d 388 (2nd Dist. 1988)). While the language in a law is usually the best indication of the intent, a statute is passed as a whole and animated by one general purpose. Thus, each part of a set of laws should be construed with every other part. (*Id.*). In applying the principles of statutory construction, the Appellate Courts have ruled that the body of a statute cannot encompass a broader subject than what is stated in the title. (*Gem City Savings & Loan v. McCloskey*, 170 Ill. App. 3d 621, 622, 524 N.E.2d 1256 (3rd Dist. 1988)). The regulation in question provides that: "Any party or staff witness who has had evidence excluded at trial may make an offer of proof." (83 Ill. Adm. Code 200.690). It is in the section of the Commission rules concerning trials, and, given that an offer of proof is made to allow the trier of fact to correct itself, this regulation contemplates making an offer of proof at trial, not in a posttrial brief.

Admission of this Evidence as a Late-Filed Exhibit

PGL also argues that there is no procedural bar to admitting the evidence here, even though at trial, that evidence was excluded as inadmissible. PGL maintains that this evidence can be admitted after trial as a late-filed exhibit pursuant to 83 Ill. Adm. Code 200.875(c). (PGL Petition for Interlocutory Review at 7-8). This argument overlooks the regulation in question.

Section 875 of the Commission's Rules of Practice is entitled "Post-Record Data," which is defined therein as "calculations and other numerical analysis of data that are related to evidence already in the record or the rate levels or rate structures being considered by the Commission. . . ." (83 Ill. Adm. Code 200.875(a)). While PGL seeks admission of evidence pursuant to subsection (c) of this regulation, subsection (c) of the regulation does not concern any particular type of evidence. It provides that "Nothing in this Section shall be construed to limit the discretion of the Hearing Examiner or Commission, for good cause shown, to consider late-filed exhibits for admission into evidence." (83 Ill. Adm. Code 200.875(c)). And, subsection (b) of the regulation provides that "All calculations and numerical analyses requested in accordance with subsection (a) above shall be requested and offered for the purpose of determining final rate levels or rate structures and for no other purpose." (83 Ill. Adm. Code 200.875(b)). Therefore, in order to qualify for admission as a late-filed exhibit, the ALJ would have to request calculations or numerical analysis of evidence already admitted into the record.

Here, however, the ALJ determined, at trial, that the evidence sought to be admitted was irrelevant. There was no request for new information on the part of the ALJ. Additionally, the evidence PGL seeks to admit is not calculations or numerical analysis of

evidence already in the record. And, while PGL claims that it is not limited by the language in part (a) of this regulation defining what can be late-filed, it ignores the language in subsection (b), which requires that late-filed exhibits must be used for determining final rate levels or rate structures, and no other purpose. (83 Ill. Adm. Code 200.875(b)). Evidence rejected as irrelevant by the trier of fact cannot be admitted into evidence pursuant to this regulation.

Taking Administrative Notice of the Evidence in Question

PGL points out that failure to admit proffered evidence can constitute reversible error. It concludes that the Commission should take administrative notice of the evidence in question, now, to allow it to make arguments based on that evidence. Thus, taking administrative notice would allow this Commission to consider that evidence in its ultimate determination regarding this case. PGL cites no other reason for this Commission to take administrative notice of other gas companies' gas charges. (PGL Petition for Interlocutory Review at 12).

Taking administrative notice of facts after trial, Staff asserts, is unfair and prejudicial to both Staff and the GCI, as these parties would be afforded no opportunity to present evidence on the subject. Staff further argues that it is unclear what the evidence would prove because this evidence does not respond to Staff's analysis of the GPAA. (Staff Response at 10-11).

Analysis and Conclusions

Failure to admit evidence at trial is only reversible error if that evidence is relevant and it is otherwise admissible pursuant to the rules of evidence. (See, e.g., *In re D.N.*, 470, 475-76, 533 N.E.2d 84 (1st Dist. 1988); *People v. Bridges*, 188 Ill. App. 3d 155, 159-160, 544 N.E.2d 40 (5th Dist. 1989)). For this reason, the statute PGL cites requires an Appellate Court to remand a case to this Commission if it fails to receive evidence that was "properly proffered." (220 ILCS 5/10-201(e)(ii)). The evidence in question was not "properly proffered," as it was ruled to be inadmissible and PGL never made an offer of proof preserving the issue for review. And, as was previously discussed, PGL waived its right to have this Commission consider the evidence at issue when it did not make an offer of proof.

Moreover, PGL states no reason why this Commission should allow it to present evidence, after trial, and in so doing, afford the other parties no opportunity to be heard as to this evidence. PGL seeks to have this Commission consider this evidence, but, it does not seek to reopen the record, or to otherwise allow other parties to present evidence on this issue.

Cook County Board of Review v. Property Tax Appeal Board, 339 Ill. App. 3d 529, 536-543, 791 N.E.2d 8 (1st Dist. 2003), is instructive on the issue PGL raises here regarding taking administrative notice. *Cook County*, was a consolidation of eight property tax appeals, in six of which, the taxpayers never presented any evidence on

the issue of uniformity, and, in the other two, the taxpayers presented scant evidence on uniformity. At trial in one of these tax cases, the hearing officer ruled that evidence on uniformity was irrelevant. (339 Ill. App. 3d at 542-43). Nevertheless, the Illinois Property Tax Appeal Board (the "PTAB") took official notice, which is the same as administrative notice, of evidence that was never introduced by the taxpayers, which was, Ill. Department of Revenue sales ratio studies. Those studies determined that there was a lack of uniformity. (*Id.* at 539).

It should be noted that the structure of the PTAB appears to be similar to that of this Commission. A hearing officer conducts the trials and the PTAB, like this Commission, is the ultimate administrative arbiter of a proceeding.

In reversing the PTAB, the Appellate Court noted that decisions of administrative agencies must be based on evidence presented to the trier of fact, who was, in this case, the hearing officer. The Appellate Court ruled that the sales ratio studies are not matters, of which, official notice can be taken. Such notice, it ruled, is limited to those facts that are so capable of verification as to be beyond reasonable controversy. (*Id.*). The Appellate Court commented that in this instance, the PTAB took notice of evidentiary material that was not presented to the hearing officer, even though this evidence may have been significant in the proper determination of the issues between the parties. It concluded that when the PTAB took official notice of this evidence, on review of the hearing officer's decision, it deprived the Cook County Board of Review an opportunity to present evidence challenging the conclusions drawn from this evidence or to dispute the truth of the facts relied upon. (*Id.* at 542).

And so it is here. PGL seeks to introduce evidence, after trial, through taking administrative notice. Staff and the parties, however, had no opportunity at trial to present evidence challenging what PGL seeks to introduce. Further, there is no procedural mechanism available to Staff and other parties, through which, they could challenge the evidence PGL seeks to introduce. As was the case in *Cook County*, if this Commission were to receive the evidence PGL seeks to introduce, it would be depriving Staff and other parties of an opportunity to be heard on the subject. The Commission should not take administrative notice of this evidence after trial.

Cook County also illustrates that, even if the evidence PGL seeks to introduce were relevant, it still could not be admitted. Because PGL asks this Commission to take administrative notice of that evidence, admission of this evidence would lack the factual context necessary to develop a fair and complete record on the issue. Staff and the other parties would not have the opportunity to dispute this evidence.

Further, taking administrative notice of this information would be without the evidentiary foundation for its admission. The evidence PGL seeks to admit is a series of graphs, bar charts and statistics. PGL provides no indication as to who prepared this evidence and what sources that person used when preparing these documents. In short, PGL did not provide evidence establishing the validity and accuracy of this evidence, rendering it inadmissible. (See, e.g., *People v. Gentry*, 351 Ill. App. 3d 872,

880-81, 815 N.E.2d 271 (4th Dist. 2004)). PGL's request for administrative notice of this evidence should be denied.

Summation

In summary, this proceeding concerns whether the costs PGL passed on to consumers were prudently incurred and were therefore properly passed on to consumers. Evidence as to how much other companies charged consumers simply is not germane as to whether the contested PGL gas costs should have been passed on to consumers. Moreover, when asking for admission of this evidence, now, PGL is depriving Staff and other parties of any opportunity to be heard regarding this evidence. And, when failing to make an offer of proof at trial, PGL waived its right to claim any error in ruling that this evidence was inadmissible.

I therefore recommend that the Commission deny PGL the relief it seeks entirely.

CES:jt